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IN THE

Supreme Court of the United States

October Term, 1969

No. 343

BOSTON AND MAINE RAILROAD, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees,

and

BOSTON AND MAINE CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

APPENDICES D, E, F, G AND H TO JURISDICTIONAL STATEMENT

BOSTON AND MAINE CORPORATION
RICHARD JOYCE SMITH, *Trustee of The New York, New Haven & Hartford Railroad Company*
THE LONG ISLAND RAILROAD COMPANY
CERTAIN CLASS II, TERMINAL AND SWITCHING RAILROADS

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INTERSTATE COMMERCE COMMISSION

Served December 23, 1965

No. 31358 [1]

CHICAGO, BURLINGTON & QUINCY R. R. CO., ET AL

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL

Decided

In Docket No. 31358, per diem charges of $2.40, $2.75, and $2.88 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found in excess of reasonable compensation. Multi-level per diem charges found not in excess of reasonable compensation in certain instances, and in excess of reasonable compensation in others. Reasonable compensation found and proceeding discontinued.

In Docket Nos. 33145 and 34405, multi-level system of rate calculation for per diem charges found unreasonable. Methods prescribed for the calculation of per diem

[1] This report embraces also Docket No. 33145, *Railroad Freight Car Per Diem Charges* and Docket No. 34405, *Southern Railway Company et al* v. *The Pennsylvania Railroad Company, et al.*

charges on a multi-level basis adequate to reasonably compensate owners of freight cars and to provide for fair, reasonable, and non-discriminatory assessment of charges upon railroads using such cars. Appropriate orders entered.

Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leo H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donald L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost, and *Erle J. Zoll, Jr.*, appeared for complainants in No. 31358 on rehearing and reconsideration.

Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis, and *Herbert A. Waterman* appeared for interveners in support of complainants in No. 31358 on rehearing and reconsideration.

Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton,

Peter Benton Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton, and *Granville Whittlesey, Jr.,* appeared for defendants in No. 31358 on rehearing and reconsideration.

William J. Hickey and *J. N. Hood* appeared for interveners in support of defendants in No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donald L. Turkal,* and *L. F. Van Kleeck* for respondents in No. 33145.

John Guandolo, David G. Macdonald and *Duncan B. Phillips* for complainants in No. 34405.

Reginald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donald L. Turkal, E. L. Van Dellen, Harold B. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Whittlesey, Jr., and *Robert W. Yost* for defendants in No. 34405.

Lyman C. Bybee for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT AND ORDER

RECOMMENDED BY R. C. BAMFORD, HEARING EXAMINER

These proceedings concern charges[2] made by railroads for the use of their freight cars by other railroads. Docket No. 33145 is an investigation instituted by the Commission on July 24, 1959, pursuant to the provisions of Section 1(14)(a) of the Interstate Commerce Act, for the purpose of establishing reasonable rules, regulations, and practices with respect to the compensation to be paid for the use of freight cars which are not owned by the using carrier. It was assigned to be heard on a consolidated record with the proceedings in Docket 31358, which case was reopened for further hearings by order of March 24, 1959. During the course of the hearings, a complaint proceeding, Docket No. 34405, was filed by Southern Railway Company, et al, which involved issues similar to those presented in Docket No. 33145. By order of March 10, 1964, this case was assigned for hearing together with Docket 31358 and 33145, then in progress.

The first of these three proceedings, in point of time, is Docket 31358, which was commenced by a complaint filed September 21, 1953, by 19 of the larger Class I railroads against nine eastern railroads. The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2.00, and $2.40 per car per day were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads,[3]

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[2] Referred to as "per diem" or "car rental" charges. See Appendix A for definitions of various terms.

[3] Listed in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I. C. C. 291.

principally classes II and III, intervened in behalf of the defendants. The Commission, on October 17, 1955, found and declared that the per diem charges of $1.75, $2.00, and $2.40 were not in excess of reasonable compensation during the periods they were effective, and that the $2.40 charge was not in excess of reasonable compensation for the then present use, and ordered the proceeding discontinued.[4] *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291 (1955).

On review by a three-judge Federal District Court in Massachusetts it was held, one judge dissenting, that the Commission had jurisdiction under sections 1(11), 13(1), and 16 of the Act and section 5(d) of the Administrative Procedure Act (5 U. S. C. A. 1004(d)) to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al* v. *United States*, 162 F. Supp. 289 (1958). The Court further (1) indicated that the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis, a suggestion that the railroad accounts pertaining to car-hire costs be broken down to reflect more accurately the actual annual cost of maintaining a freight car; (2) questioned whether depreciation should be based on undepreciated ledger value or on undepreciated reproduction value used by the Commission; (3) disapproved the Commission's use of average car age in establishing the car-day divisor, and (4) condemned its failure to give adequate consideration to mileage as an element in arriving at charges for car-hire. Because of the failure to consider mileage, the Court vacated the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the majority opinion of the Court.

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[4] Reversing, in part, the finding of the Hearing Examiner that the rate of $2.40 was in excess of reasonable compensation to the extent that it exceeded $2.10.

On appeal to the Supreme Court, the Commission sought and was granted remand of the proceeding to it for consideration and disposition in accordance with the terms of the three-judge court's decision and order. *Boston & Maine R. Co.* v. *United States*, 358 U. S. 68. Accordingly, upon petition of the complainants and supporting interveners, the Commission on March 24, 1959, reopened the proceedings for further hearing.

On July 24, 1959, the Commission, by order in Docket No. 33145, initiated prescriptive action under section 20 of the Act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car per diem charges, and ordered an investigation pursuant to section 1(14)(a) looking to the establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the Act were made respondents. At the same time, the proceedings in Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in Docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate was to be established. This agreement had been approved by the Commission pursuant to Sec. 5(a) of the Act, and became effective on October 7, 1950.[5] On June 10, 1953, these

[5] *Association of American Railroads—Agreement*, 277 I. C. C. 413; *Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 300 I. C. C. 73, 302 I. C. C. 265. This agreement provides for use of the services of the General Committee of the Operating-Transportation Division of the Association of American Railroads, and the Board of Directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates sub-

(footnote continued on next page)

defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[6] Thereafter they continued to receive and deliver cars of other lines but paid car rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

Following the institution of proceedings in Docket 31358 there were filed, and are now pending in the United States District Court, Southern District of New York, 109 complaints, consolidated by the Court for all purposes wherein numerous rail plaintiffs seek to recover from the New York, New Haven and Hartford and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1,

(footnote continued from previous page)

mitted to the members of the agreement by the AAR Board of Directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the Association, together with the use of the Association's facilities and committees to administer the provisions of the agreement have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid. A description of the procedures involved in calculating and effectuating per diem rates appears in *Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 300 I. C. C. 73.

[6] The first railroad to refuse payment was the New York Susquehanna & Western Railroad Company which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2.00 rates. It appears that subsequent to the institution of proceedings in Docket 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with repect to the rates preceding the $2.40 rate.

1959, and since then of $2.88,[7] less interim payments of about $2.00 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the Court disposed of several motions and directed immediate entry of partial summary judgment for plaintiffs. The judgment in favor of 21 of the plaintiffs extended only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are found by the Court to be due them—

> "* * * based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court for each month beginning with August, 1953 to date to be computed with interest."

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending the determination by the Commission of the per diem controversy in No. 31358 or until further order of the Court. The plaintiffs were directed, with their consent, to amend their complaint in this proceeding so as to request the Commission—

> "* * * without regard to the proceeding pending in Docket No. 33145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with Au-

[7] Whether the complaints have been amended to include charges accruing thereafter, or to include charges based upon the multi-level rates, effective January 1, 1964, is not of record.

gust 1953, to date, for the purpose of the suits consolidated herein; * * *"

Accordingly, the plaintiffs (complainants in 31358) sought and were granted leave to so amend their complaint. Interveners and petitioners for intervention also sought appropriate leave to intervene in support of the complaint so to be amended. By order entered by the entire Commission on December 19, 1962, leave was granted.

The Illinois Central Railroad Company, one of the complainants in No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, County of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, Index No. 115 59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, Index No. 70 63. In each case, the plaintiff sued the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the Court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August, 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (Docket No. 34059), pursuant to section 1(14)(a) of the Act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multi-level per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in No. 31358 leave to further amend their complaint so as to bring in issue the multi-level rates which had become effective on January 1, 1964.

Briefly stated, the issues presented to the Commission by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car owning railroads for the use of their cars by other railroads were just, reasonable and compensatory as provided in Sections 1(10), 1(11) and 1(14)(a) of the Act, and if not, what rates would meet the standard for each period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future.[2]

Preliminary Discussion

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to return them to their own

[2] For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling service proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for onward movement without disturbing the lading.[2] With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co. v. I. C. R. R. Co.*, 22 I. C. C. 39, 44-45; *Chicago, R. I. & P. Ry. Co. v. U. S.*, 284 U.S. 80, 91, 101-102; *U. S. v. Pennsylvania R. Co.*, 323 U.S. 612, 615. While contributing to transportation efficiency, however, this method of operation created certain problems with which the industry has wrestled ever since. The originating line is deprived of the use of its car until its return, while the connecting lines are enabled to perform their portion of the transportation service without employing one of their own cars.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry. v. Southern R. Co.*, 96 I. C. C. 591, 593-594. "It is a fundamental principle that a car owner is entitled to adequate compensation for the use of his car by another carrier." *Morehead & North Fork R. R. Co. v. Chesapeake & O. Ry. Co.*, 100 I. C. C. 45, 48; *Jefferson & Northwestern Ry. Co. v. Missouri, K. & T. Ry. Co.*, 102 I. C. C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's

[2] Cars involved in this interchange service, and with which the charges here in issue are concerned, are customarily referred to as "per diem" cars.

the rates were generally one cent per mile on cars of special construction, and ¾ cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and demurrage plan, and two central-western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 US 80, 101-103. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car.[9] By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day. Subsequent increases were as follows:

Effective Nov. 1, 1949	$1.75
May 1, 1952	2.00
Aug. 1, 1953	2.40
Jan. 1, 1957	2.75
Dec. 1, 1959	2.88
Jan. 1, 1964	Multi-level rates.

In Docket 31358 findings are sought in order to assist in resolving specific disputes as to the amount of damages, if any, to which the complainants may be entitled. The

[9] The daily rate was originally entitled a "per diem" when promulgated in 1902. Certain parties prefer the term "car rental". Both terms are used herein to mean the compensation to be paid, on whatever basis computed.

Commission's findings in this case as to the reasonableness of the rates charged in the past can have effect only as an aid to the settling of the dispute between the parties, and to the Courts as an aid in settling the amount of damages they may award. Dockets 33145 and 34405, which invoke the Commission's authority under Section 1(14)(a) of the Act, require the issuance of an order for the future. The principles which govern the Commission's findings should not differ, however, as between the past, present or future rates, other than made necessary by limitations on the information available for their application.

Section 1(10) of the Interstate Commerce Act defines "car service" as including, inter alia, the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to Part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it. The term "compensation" is commonly understood as having the meaning of making whole, an equivalent, indemnification, maintaining an equilibrium, or providing a quid pro quo for a service rendered. As used here it does not connote any element of profit to the owner, nor may it be measured by the benefit to the user. The charge should be equivalent to the car-ownership costs which the user would have to bear if it owned the car. See: *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I. C. C. 591, 593-594; *Marcellus &*

Otisco Co. v. New York Central R. Co., 104, 389, 392; *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 378; *Palmer* v. *United States*, 75 F. Supp. 63; Black's Law Dictionary, 4th Ed., 1951; Funk & Wagnalls New Standard Dictionary, 1946; Webster's Third New International Dictionary, 1961.

It is apparent that if there were but two railroads, and each used the other's cars to the same degree, the payments would balance out and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance out receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. In 1960 there were over 100 Class I line-haul railroads, over 300 Class II line-haul railroads, and about 200 Class I & II Switching & Terminal Companies and electric railways involved in these payments. At any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year.

Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status, since they earn more on cars sent off line than they pay on cars received. They suffer from particular problems, not the least of which is the loss of use of cars sent out in interchange service, and the necessity of using, in their place, interchange cars of other carriers which may be older and less desirable. At times, it appears that they may have to forego shipments where no cars are available. At the same time railroads with a high ratio of terminations to originations, net per diem debtors, have equivalent problems. With large numbers of cars of other railroads delivering freight to points on

their lines, they are required by the AAR Car Service Rules to place outgoing loads in such cars, losing the opportunity to earn per diem credits by use of their own cars. Delays, justified or not, in the return of cars to owners, have engendered criticism and allegations of abuse of car service rules in this respect. The problem is also intimately connected with that of the adequacy of the total supply of cars available to carry the nation's commerce.[10] No small part of the present dispute arises from the desire to use the compensation payments as a method of enforcing the car service rules governing the return of foreign cars,[11] or as a method of solving the problem of car shortages. As pointed out in *Palmer* v. *United States*, 75 F. Supp. 63, the only power vested in the Commission is to establish reasonable compensation for the use of the cars. "The penalty or incentive characteristic of the per diem is merely an inherent quality of a charge based upon time." (p. 68).

Certain fundamental distinctions exist which make this problem different from, and render of little guiding value,

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[10] Presently the subject of a separate proceeding, *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices*, Ex Parte No. 241, 323 I. C. C. 48. Proposed legislation to authorize the Commission to consider this factor is pending before the Congress of the United States. Even if such authority is conferred, however, it remains essential to ascertain in the first instance the charges which, as precisely as possible, are necessary to compensate car owners for their ownership costs, and the manner in which these costs may be fairly distributed among users.

[11] The term "foreign cars", as used herein, has reference to a car which is not, at the time, on the owner's tracks. See Appendix A. The "penalty" theory, designed to induce prompt return of cars, has played no small part in the approach to solution of the per diem problem. See, for example, *Car Shortage—Insufficient Transportation Facilities*, 12 I. C. C. 561, 573. In that case the difficulty of dealing with enforcement of car service rules via the per diem route was noted. Section 1(14)(a) of the Act now confers power on the Commission to make and enforce rules respecting car service.

the cases and arguments which have to do with the charging of rates by railroads, utilities, or other businesses to their customers. In the latter cases, the charge is for the services or articles being sold, out of which charge must come the cost and profit to the particular industry. It must contain the element of bringing in additional capital over and above that expended in providing the service or article to the user. The function to be performed by the per diem charge, and the responsibility of the Commission, is to ensure an equitable sharing of the ownership burden when railroads make use of cars of other lines. That burden is comprised of the costs of acquiring the car, taxes assessed thereon, and the cost of repairing and maintaining the car as an effective revenue producing piece of equipment. The problem is not one of fixing rates, in the customary sense, but of ascertaining the burden and providing a method by which it may be fairly shared by all users, *including the owner when acting as a user of its own car.* Since the car owner is to be made whole, it is first necessary to ascertain what amount will be necessary on an annual basis to accomplish this result.

Cost Section Studies

To facilitate the investigation in Docket No. 33145, the Commission incorporated in the order of investigation an order under Section 20 of the Act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal pre-hearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebuttal state-

ments.[12] After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the Class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways were required to complete only Forms 1, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.

1 — Special Study of Freight-train Car-miles and Car-days.

R-1A — Report of Per Diem Days and Payments.

2 — Special Study of Amounts charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.

3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.

4 — Summary of Special Study of Work of Freight-train Car Inspectors.

5 — Separation of Account 314—Freight-train Cars—Repairs.

6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest thereon, Appli-

[12] The participation by the respondents in the preparation of the forms did not, of course, make binding upon them the results of the studies made. In some instances certain respondents did not agree that the proposed studies would produce reliable results, and evidence, subsequently offered, challenging those results is considered later in this report.

cable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.

7A — Special Study of Switch Engine Hours Applicable to Freight-train car Repairs.

7B — Non-revenue Freight Used in Equipment. Repairs.

7C — Maintenance of Power Facilities for the Year 1960.

7D — Analysis of Certain Items Reported in Annual Report, Schedule 376—Hire of Freight Cars, for the Year 1960.

7E — Maintenance of Work Equipment.

7F — Maintenance of Miscellaneous Equipment.

8 — Taxes Applicable to Freight-train Car Ownership.

9 — Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.

10 — Survey of Car Accounting Methods.

11 — Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, train yards, or railroad offices, located in 29 different states.

Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an Industry Advisory Committee on Per Diem Costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.[13]

The special studies were accomplished, and reported on the prescribed forms, by 104 Class I Line-haul Railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

Class II Line-haul Railroads	72
Class I Switching & Terminal Companies	27
Class II Switching & Terminal Companies	45
Line Haul Electric Railways	3
Other Electric Railways	8
Total Short Lines	155
Class I Line-haul Railroads	104
Total Reporting Roads	259

[13] More fully described subsequently herein.

From the information received as a result of these special studies, and the annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1, Summary MT-1, Summary MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.903 cents per car per day.[16]

This Summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 41.417 cents per day.

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[14] This formula is designated by the Cost Section as Rail Form H, No. 7-62, *Formula For Use In Determining Per Diem Charges For The Use Of Freight—Train Cars.* It will be referred to hereinafter as Form H.

[15] The cost analyses supporting these summaries are also contained in the exhibits of the Cost Section.

[16] The methods used by the Cost Section to reduce annual costs to daily costs are set forth in more detail in discussing issues connected therewith.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both Summaries T-1 and MT-1, employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the Summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the Class I line-haul railroads separately, and for Class II roads by groups, as well as individually for the defendant railroads in Docket 31358 and for the various different groups of reporting railroads in the special study program. In this Summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the

average mileage over which they move such cars. It differs from Summary T-1 in that while still designed to return to car owners their full costs of ownership, it attempts to refine the data so as to reflect differences between using lines measured by the use they make of the cars. Thus, for each railroad in this Summary, the mileage cost developed in MT-1 is multiplied by the 1960 line haul and equated switching [17] car miles of foreign per diem cars on the particular carrier, and the result divided by the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in Summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, for which the computation was made. The unit cost for all U. S. railroads computed by the method in MT-2, which is comparable to the unit cost of 249.903 cents per day in Summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like Summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in Summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each

[17] See Footnote No. 128, below.

carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained by the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 149 cents. The mileage cost of 2.323 cents developed in Summary MT-1 is applied to line haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles traveled by it.

At the hearings it appeared that other factors, such as the age, value, or type of car, might deserve consideration. As a result, the Cost Section, utilizing the data and computations heretofore described, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing costs using each of the four formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, etc. by value of car, it was assumed that all costs other than depreciation and return would remain the same, regardless of the value or age of the car. For convenience of comparison, the value brackets used in this computation are the same as employed in the AAR multi-level rates now in effect. Issues concerning the details and results of the Cost Section studies are considered subsequently in this report.

A. A. R. Calculations

Per diem calculations by the AAR staff during the past 15 years, have followed the same general pattern but have differed in their details with respect to each

rate. Cost statistics for a recent 12 month-period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, etc., interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car day divisor to develop a unit cost per day, and the results totalled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, etc., leaving to the General Committee and the Board of Directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car day devisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produce a figure referred to as "active car days per car per year" which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from five to fifteen years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding twenty-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting

[18] The calculations supporting the $2.88 and multi-level rates differed, in that two car day divisors were employed. The total cars at the end of the year was employed to calculate unit cost of depreciation and interest on freight cars while the average of the cars in use at the beginning and end of the year was used for all other costs.

the $2.75 and earlier rates. In the calculations supporting the $2.88 and multi-level rates, the repair expenses for the most recent five year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multi-level rates used a flat three percent rather than the average of 3.06 percent. Beginning with the calculations supporting the $2.40 rate, reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, etc., has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction cost basis was employed.

Interest on investment has been calculated at six percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.50 rate the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

In developing the multi-level rates, the AAR staff calculated the annual costs per car for all items mentioned above except interest and depreciation on freight cars. The latter were separately calculated with respect to each of the value brackets, using reproduction cost as a base. Inauguration of rates graduated according to the value of the car imposed substantial changes in the system which had theretofore prevailed in accounting for the compensation payments. With a single rate applicable to all cars, carriers had only to determine from the junction reports, showing when cars were received and delivered to each carrier, the total number of days per diem to be multiplied

by the rate. It is now necessary to determine the number of days for each car and the rate bracket applicable to that car, calculating charges on each car separately.

Administration of the multi-level rate system was established by the organization of a Control Center within the Operating-Transportation Division of the Association of American Railroads. On March 29, 1963, the Board of Directors of the AAR authorized an appropriation for this purpose, to acquire office space, equipment, data processing machinery and necessary employees. The first instructions to all United States, Canadian and Mexican railroads were sent out on May 6, 1963, and revised on June 25, 1963. They included forms for reporting all cars at their original cost, and the amounts of additives to those costs, if any, together with sundry information including the year installed, whether new, rebuilt, or second-hand, AAR mechanical designation, etc. A table was included from which the multi-level rate applicable to each car could be ascertained. A standard punch card method of reporting the same data was provided for car owners having the equipment for this purpose. Where owners reported on the forms, the cards were punched at the Control Center.

All railroads had reported, as requested, by the latter part of September, 1963 and a preliminary Master List of all per diem cars was distributed to all railroads on October 10, 1963, listing 1,706,414 cars in alphabetic code, mechanical designation and car series order. Also distributed on that date was a preliminary alternate Master List covering the same cars but listed without regard to mechanical designation. To the railroads submitting requests therefor, there was distributed the same data on magnetic tapes and on master series decks of cards, for use in appropriate data processing machines. Between September and December 31, 1963, numerous corrections to the reports were submitted by the railroads, caused by

cars retired, installed, changes in mechanical designation, and changes in valuation. All were processed through the end of the year and, on January 15, 1964, Master List No. 1 and Alternate Master List No. 1, in written as well as magnetic tape and punch card form, were distributed. The function of the Control Center thereafter was, and will continue to be, the processing of reported changes in cars and the monthly publication of corrections to the Master List. The first three such publications in 1964 contained, on an average, about 5,000 changes each.

In choosing a rate to be submitted to the members of the per diem agreement for vote, the AAR officials customarily have considered the various calculations received from the staff, on occasions revised them in some respects, and rounded off the results to produce an even number of cents per day. Thus calculations of $2.76961 and $2.87940 were rounded to $2.75 and $2.88. While the validity of the calculations used in ascertaining the costs have been challenged in these proceedings, it is clear that the AAR rates have purported to do no more than equate the daily ownership costs of freight cars in per diem service. The multi-level rates which became effective on January 1, 1964, are as follows:

	Value Bracket	Per Diem Rate
(1)	$ 1,000 and less	$2.16
(2)	1,001 to 5,000	2.79
(3)	5,001 to 10,000	3.58
(4)	10,001 to 15,000	4.50
(5)	15,001 to 20,000	6.15
(6)	Over $20,000	7.74

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the

scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by Bracket No. 6, as follows:

(6)	$20,001 to $25,000	$7.11
(7)	25,000.01 to 30,000	9.00
(8)	30,000.01 to 35,000	10.18
(9)	35,000.01 and over	12.18

Assignment of cars to appropriate brackets is accomplished on the basis of their depreciated original cost plus additions and betterments. When cars were built in their own shops, car owners may include in the original cost certain expenses which may not have been capitalized at the time of building. These so-called "additives" are challenged by Southern Railway, and are treated subsequently herein. This carrier urges a third method of calculating per diem rates, which differs from both the AAR method and the calculations of the Cost Section. With some exceptions it accepts the Cost Section calculation of repair costs, but supports rates based upon recovery of capital costs by depreciating original cost over a 14 year period, instead of 30, using a double declining balance method, and allowing 8 percent interest before taxes on the undepreciated balance. These contentions are considered further in other sections of this report.

Although all common carriers by railroad in the United States are affected by the payment of per diem rates, the matter is of particular interest to those which, on an annual basis, are net creditors or debtors by appreciable amounts. While numerous carriers appeared and participated in the hearings, the parties filing briefs, and actively concerned with these proceedings may be identified as follows:

(1) Complainants in Docket No. 31358, supporting the past AAR rates.

(2) Defendants in Docket No. 31358, opposing the past AAR rates.

(3) The "20 Road" Group.[19]

(4) The NYC, PRR, C,M, St. P&P, and the Lehigh Valley.

(5) The NY, NH&H, and the B&M.

(6) The Long Island and the New Jersey and New York Railroads.

(7) The Southern Railway System.

These groups are by no means mutually exclusive, there being a number of overlapping memberships. Thus, for example, the NYC group, while also complainants in Docket 31358 and supporting rates there based solely on time, favor a time-mileage system for the future. Most of the other complainants are in the "20 Road" Group, and oppose time-mileage for the future. The NY, NH&H group and the Long Island group favor a time-mileage system as does the NYC group but, unlike the latter, oppose use of reproduction costs. Southern Railway, which also opposes use of reproduction costs, supports a time only rate substantially higher in the early years than the AAR rates which are based upon such costs. For the purposes of this report, the issues have been grouped into those respecting the car day divisor, the ownership re-

[19] Great Northern, Northern Pacific, Chicago, Burlington & Quincy, Colorado & Southern, Atchison, Topeka, and Santa Fe, Illinois Central, Denver & Rio Grande Western, Western Pacific, Louisville & Nashville, Gulf, Mobile & Ohio, Western Maryland, Union Pacific, Southern Pacific, Norfolk & Western, Atlantic Coast Line, Seaboard, Missouri Pacific, Texas & Pacific, Soo Line, St. Louis-San Francisco, Chesapeake & Ohio, Fort Worth & Denver, and Baltimore & Ohio.

pair and maintenance costs, ownership capital costs, (including taxes), and alternate proposals for the construction of charges. Determination of the ownership burden and its distribution among users are then considered, followed by consideration of the past rates.

II—Car Day and Car Mile Divisor

Reduction of the total annual cost of car ownership to an amount per car per day, whether all costs or only those attributable to the passage of time are used, requires ascertainment of the number of car days to be used as a divisor. It has been customary to exclude from total possible car days, the car days of unserviceable cars requiring repair and cars which, for lack of available employment are considered surplus. In other words, the cost of the per diem fleet must be spread over and borne by the cars engaged in earning revenue. Two special studies in Docket 33145 were carried out to supply working data for this purpose. The first provided a seven day sample of car miles, a twelve day sample of number of serviceable freight-train cars on line, a seven day sample of number of "No-Day" cars [29] on line and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars. Another seven day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 A. M. of the next day follow-

[29] "No-Day" cars are those for which no per diem charge accrues due to their being received after midnight and delivered before the succeeding midnight.

ing a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem days receivable by type of car, for cars on railroads outside the United States.

In developing the car day divisor for 1960, the Cost Section averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year.[20a] The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car, as developed from the cost section studies, furnishes a measure of the days, on an average, that each car was engaged in revenue producing service.[21] While it provides a measure of the days over which the revenue from its service may be spread, it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order

[20a] 1,641,200 cars multiplied by 366 days.

[21] This term, as used here, includes empty return movements, as well as loaded movements and days cars are in possession of shippers or consignees.

category.[22] Payments are thus made for days excluded in the calculation of the 288.25 days mentioned above. For this reason, the cost section calculations did not separately compute the active car days per car, but employed the unit costs per active car day as a step in computing the daily costs for foreign cars spread over the total days in 1960 on which per diem payments were made. The active days of per diem cars on foreign lines was multiplied by the unit cost per active car day of all per diem cars to produce a total cost for cars on foreign lines. This amount was then divided by the total days on which per diem was paid to spread the cost over the total number of payments. In Summaries MT-1 and MT-2, the mileage factor was reduced to a daily figure in a similar fashion by dividing the total mileage cost by the car miles of all per diem cars. The cost per car mile was then multiplied by the total mileage of foregn per diem cars and the result divided by the per diem days paid for.

It is apparent that fairness to users of foreign cars requires that total ownership costs of such cars be spread over the total days for which payments are or should be made, rather than over total active car days only. The 1960 Cost Section studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio of per diem payable days to active car days is 1.06263. Applying this ratio to the 473,083,857 total active car days of all per diem cars, produces some 502,715,000 per diem payable days, or about 306 per

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[22] For various reasons, and pursuant to particular arrangements, certain reclaims are permitted or per diem charges waived. In 1960 the difference between total foreign per diem car days on line and total days paid for was 1,054,653 days, less than ½ of one percent.

diem payable days per car per year, for application to the total costs of all per diem cars.[23]

An appreciable difference exists between the car day divisor as computed by the Cost Section methods and those used by the AAR in the calculations underlying the various per diem rates in issue. The analysis underlying the rate of $2.88 employed a figure of 332.59, days per car based upon the average of utilization ratios for the twenty year period, 1939 through 1958. Calculations underlying the multi-level rates employed a figure of 335.33, using the average for the period 1942 through 1961. For the year 1960, the figure calculated in the same fashion is 322 days, some 33 days more than the 306 developed by the special studies. The difference stems in part from the AAR system of computing directly a divisor applicable to the total costs of all cars instead of separating the costs attributable to foreign per diem cars, as did the Cost Section. The most significant differences are as follows:

First: The cost analyses underlying the AAR rates, in calculating the total possible per diem car days, did not exclude cars not in per diem service. Thus, for the year 1960, the figure used was 1,685,910, rather than 1,641,200. The former figure admittedly includes cabooses and other cars not used in per diem service. Its use resulted in an excess of 16,363,860 possible car days for that year. The same method was used throughout the process of averaging the twenty year periods. While the AAR calculations did not exclude the car days of cars not in per diem service, it appears that they neither excluded the costs attributable to such cars. Inclusion of the costs and car days of the extra cars would introduce error into the calculations only to the

[23] The same result may be reached by dividing the total ownership costs for 1960 as computed by the Cost Section, $1,256,295,212 by the calculated Summary T-1 cost of $2.499 per day, and then dividing the required number of total per diem payable days so indicated by 1,641,200 cars in service.

extent that these cars incurred costs substantially different from those of per diem cars.[24]

Second: In calculating "active" car days, the AAR deducted only the surplus and bad order car days of cars on owner's lines. All days of cars on foreign lines are treated as active. By including the surplus and bad order car days of foreign per diem cars the divisor was enlarged, producing, in relation to costs of all cars, and with somewhat less accuracy, an effect similar to the Cost Section recognition of the greater significance of per diem days paid for.

Third: The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on Form CS-44, the number of surplus cars on hand, both home and foreign. A one-week test in February, 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Cost Section studies.[25]

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[24] The 1960 studies indicate that the non-per diem cars constituted less than three percent of the total. See also: *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, 387.

[25] On the other hand, the deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on Form CS-60 the home per diem cars out of service for this cause. A test in September, 1950, indicated that these reports were understated some 23.4 percent. In subsequent per diem cost calculations they were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The 1960 studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next days loading. It is a figure which the AAR witness conceded was not very accurate, was generally understated, particularly in periods of car shortage, and subject to a "psychological factor." For the purpose of these proceedings the figures resulting from the 1960 studies, and the car day divisors produced thereby, must be taken as the more reliable.

The car day divisor used by the Cost Section was based solely on 1960 statistics, and was applied to 1960 costs. In past computations used to develop the per diem rate, the AAR has employed a somewhat different approach. Using various periods of time, from five to twenty years, the average of the annual ratios of "active"[26] to total cars has been developed, and that average ratio multiplied by the number of days in the year[27] to obtain "active car days per car per year." This figure has then been multiplied by the average number of cars in use during that year. In its 1949 decision,[28] the Commission said:

> "The per diem rate could be revised upward and downward periodically to conform to annual fluctuations in the number of active cars, and if based on the approximate costs of ownership and maintenance and active cars for a designated recent year it could not be said to be unreasonable. Or the rate

[26] The AAR uses the term "active cars" to include all cars owned or leased in the year less bad order and surplus cars on lines of owners.

[27] The "year" referred to is the year whose cost statistics were employed in the AAR calculations.

[28] *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, 389.

> could be determined by the use of an active-car ratio based, from time to time, on the average number of active cars in use over a representative period of years, and, if predicated on the approximate costs of ownership and maintenance for a designated recent year, the rate so fixed could not be said to be unreasonable. Stated differently, there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate. The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years."

There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the actual costs incurred in that period be employed, but also the actual active car days for that same period. Per diem charges, however, are established for use in the future, and the employment of a car day divisor based on an average active car day ratio over a longer period stems, in part at least, from the desire to approximate the average conditions of car use to be anticipated. Use of the longer period is founded in the assumption that the rate being established will remain in effect over a number of years, during which the average car usage will prevail. The AAR approach, however, assumes that the per diem costs for the year of computation (or the 5 year average as used more recently) will be representative, but that the active car ratio for that same period will not be representative, of the future years; an assumption which appears somewhat inconsistent. Another purpose was mentioned by the Commission in the 1949 decision, as follows:

> "The use of an active car divisor predicated on average age would result in the maintenance of a

> relatively high per diem rate when traffic is heavy and cars are in urgent demand, and a per diem rate relatively low when traffic is light and many thousands of freight cars are idle." 274 I. C. C. 383, 389.

It is apparent that the foregoing rationalization is true only if the divisor chosen actually represents the approximate mean of car usage conditions over the future years during which the computed rate will apply.[29]

The evidence in these cases is convincing that a substantial part of the car repair costs in any year varies with the amount of use given the car in that year, and that, generally, the total industry-wide repair work undertaken varies with the overall demand for cars. Unless the average car day divisor is applied to the average per diem costs for the same period of time, it does not measure the ownership costs for the past. If the average of a period of past years is to be chosen as a measure of future car utilization, the same measure should apply to costs, and it should be because of some demonstrated relationship between the past and expected future usage. The fact that the average age of all cars in interchange service, some

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[29] Nor is there any reason to conclude that the failure to compensate the owner in light traffic years would be balanced by "over-compensation in heavy traffic years. Cars move or remain idle depending upon shipments offered, not upon the influence of per diem charges which attempt to simulate a free market condition. The suggestion is not new, however. See the dissenting report of the Director of Maintenance and Operation, Union and Southern Pacific Systems, to the Report of Commission on Interchange of Freight Cars, (McCrea Report) Proceedings of the American Railway Association, Vol. 5, 1909, page 916. The sometimes-mentioned theory that per diem rates should be set higher when cars are most needed than when traffic is light appears completely repugnant to the principal of equitable sharing of costs. See comment in *Car Shortage—Insufficient Transportation Facilities*, 12 I. C. C. 561, 573.

over 50 years old, is about 20 years, has no apparent relationship to the annual car usage nor does it warrant the conclusion that the average usage over that period is a sound measure of average car usage conditions for an indeterminate period in the future.[39] See *Boston & Maine Railroad* v. *United States*, 162 F. Supp. 289, 297.

The AAR has experimented with the use of 5, 10, 15 and 20 year periods to estimate the car utilization to be anticipated in the future, without any apparent logical basis for choosing the particular period. The record in these proceedings does not provide any rational basis to support such a choice. Should there occur a violent fluctuation in car utilization between two consecutive years, per diem rates based upon the first might be unrealistic for application in the second, but the record does not indicate that such fluctuations are normally to be expected. Between 1946 and 1961, the utilization as computed by the AAR varied from 86.12% to 95%. The greatest change occurred between 1957 and 1958, a drop of 6.7%. Generally the difference between any two years was less than 4 percent.

For reasons mentioned subsequently herein, the Examiner is of the opinion that per diem costs may be calculated annually and the rates reviewed on a yearly basis, while such annual review does not necessarily imply a change in the rates at similar intervals, it renders unnecessary the attempt to approximate conditions over a span of future time by reference to any fixed span of past time. A change in rates would not be required by the results of operations over a year of demonstrably unusual conditions unless there was reason to anticipate their continuance. Projected utilization for the following year could be more reliably estimated by application of experienced judgment

[39] Comparative analysis of the predictive reliability of car utilization ratios for the single prior year, and the average of periods of 5, 10 and 20 prior years, indicates the use of the single prior year would have been more accurate

to the existing economic conditions, the experience of the past years, and the trend, if any, in the utilization factor, than by uncritical reliance upon an average of any number of past years.

To the extent that any portion of the car user charges is measured by mileage, it is necessary to calculate a figure similar to the car day divisor, in order to equitably spread the costs attributable to this factor over the miles operated. Calculations of this nature have not been necessary under the basis of rates used in the past, and the only evidence available in this record is that developed by the special studies in 1960. Data reported on Form 1 produced total figures for daily average line haul car miles of all carriers for home and foreign per diem cars. Deducting the average number of surplus cars on line from the average serviceable cars, produced a figure for average active cars which, divided into the average car miles, indicated that the average distance traveled by home per diem cars was 32.3 miles, by foreign cars, 58.0 miles and by all per diem cars, 44.5 miles, per active car day. A separation of the amounts reported on Form 1 between eight classes of cars suggests that appreciable differences exist in the utilization which should be reflected in the mileage portion of the charge. Thus, TOFC cars are reported as averaging 226.9 line haul miles per active car day, stock cars, 93.8, box cars, including automobile cars, 60.8, other flat cars, 50.4, closed hoppers, 44.8, open hoppers, 31.2, and gondolas, 26.5. While this breakdown is possible from the data reported on Form 1, that study was not designed to ascertain average mileages by classes of cars, and was not stratified with that purpose in mind. In some instances, such as the TOFC cars, a relatively small number of cars was involved, and the cost section witness indicated doubt as to the extent to which reliance could be placed upon the average. In these circumstances it would not be proper to attempt the calculation of mileage charges varying with the type of car, in reliance upon the information now avail

able. Appropriately designed samples should be promptly taken, however, and such calculations made if differences such as are suggested by this record proved to exist. On the evidence it is found that, for present purposes, an average car mile divisor applicable to all cars must be employed. In this connection the comments in Section IV-A of this report are applicable. See Pages 43 et seq.

III—Ownership Repair Cost

A—*General.*

In its 1955 decision, the Commission observed that freight car repairs constituted the largest single category of expense included in the car rental charge, amounting to some 40 percent of the total.[31] The special studies conducted by the Cost Section during 1960 were, in large part, directed to the problem of analyzing the cost of repairs to per diem cars and development of data which would aid in resolving some of the issues raised in respect to those costs. Particular attention was given to separation of the expenses charged to Account 314 which, as noted in the 1955 report, is the largest of the primary operating expense accounts embracing nearly 10 percent of total freight expense. The basic separation in connection with all repair expenses was between home and foreign per diem cars, with repairs to each separated between owner and user responsibility work.[32] Two sample studies were made, using Forms 2 and 3, heretofore mentioned, and covering seven periods of two days each at intervals

[31] The report in *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, indicates that repair costs were, in 1946, about 44 percent of the total costs employed in fixing the per diem rate.

[32] Definitions of these and other terms used in the studies are set forth in Appendix A to this report. The distinction is necessary to insure inclusion in the per diem charge only those costs which should fairly be shared by all users. Repairs due to improper use of the car are not shared under this separation.

during 1960, to develop the proportion of repair wages and materials applied in each of these categories by repair facilities. Another test, using Form 4, covering seven test periods of one day each at intervals during the year, was conducted to develop the proportion of wages of car inspectors assignable to various of their functions, including repairs made by them in train yards. This study also sought to develop the cost of materials used in the making of such repairs and the consist of the trains inspected. These studies were carried out by all Class I line-haul carriers, and analysis thereof indicates that about 79 percent of all wage and material costs were items of ownership responsibility and seven percent items of user responsibility. The remaining 14 percent involved non-per-diem cars which are not involved in these proceedings.[33] The total ownership repair costs for 1960, as computed by the Cost Section, amounted to $583,715,117, and comprised over 46 percent of the total expenses included in the per diem cost calculation.

Account 314 was analyzed by each Class I line-haul carrier on Form 5, for the year 1960, so as to show separately the following items:

1. Freight-train car repair wages.
2. Freight-train car repair materials.
3. Amounts paid to and received from other railroads on account of car repair work.
4. Wages—train yard inspection.
5. Payments for foreign cars destroyed, less salvage.
6. Switching expenses in connection with freight-train car repairs.

[33] In all studies, non-per diem cars, including cabooses and mileage cars were excluded, and the costs applicable thereto separated from the analysis.

7. Miscellaneous items in account 314, including general shop employees, power, heat, light, etc.

Repair wage and material costs for the entire year, as thus segregated, were separated between per diem ownership expenses and other expenses on the basis developed by the sample studies made on Forms 2, 3, and 4. A separate sample study included in Form 5, conducted during four months, one in the middle of each quarter of 1960, was used to analyze the amounts paid to and received from other railroads on account of car repair work. The results were employed to separate the total of such payments and receipts in Account 314 between owner and user responsibility. Miscellaneous items in Account 314 were assigned to ownership costs on the basis of the repair, train yard inspection and switching costs shown in that account. Form 4, heretofore mentioned, provided a basis for separating the wages paid for train yard inspection between various functions, and was also used to pick up certain portions of such wages charged to Account 402 and elsewhere. There was excluded the portion of such wages assignable to transportation activities.[34] The portion assigned exclusively to making repairs in train yards was separated between home and foreign cars, and ownership and user responsibility as indicated by the study. That portion of inspectors wages assignable to looking for mechanical defects and carding for defects was assigned to ownership expenses on the basis of the costs of the repairs made to such cars, while a portion of miscellaneous inspection work costs was assigned to per diem ownership costs on the basis of the distribution of all other inspection costs in Form 4.

[34] These included such activities as coupling air hoses, testing air, oiling journal boxes, adjusting packing, checking and carding cars for commodity loading, preparing cars for loading, coopering, cleaning, inspecting and adjusting lading, closing side doors, checking for right-of-way clearance, etc.

Payments for foreign cars destroyed, less salvage, were excluded from the ownership cost computation as was also the amount in Account 314 for switching expenses in connection with freight-train car repairs. The latter, which does not cover all switching expenses which are related to repair of cars was replaced by a computation based upon the factor of $49.08 per switching locomotive hour, as developed from Rail Form A, *Formula for Use in Determining Rail Freight Service Costs.*[35] Using special study Form 7-A, a sampling was taken on seven selected days throughout the year 1960 to show the switch engine hours switching bad order cars. The switch engine hours were expanded to a full year and multiplied by the above cost to produce a total cost for switching bad-order cars. This amount was then distributed between per diem and non-per-diem cars on the basis of the number of each switched. Separation of switching costs of per diem bad order cars between ownership and other costs was made on the basis of the costs of repairs done to each. A sample study was made on Form 11 to develop the costs of repacking journal boxes separated between home and foreign cars, and ownership and user responsibility, and the proportions used to distribute to per diem ownership costs the charges for this item in Account 402.

The cost of transporting repair materials to locations where they are to be used is covered by the item of non-revenue freight. By a seven day sample study similar to those described above, the ton-miles applicable to such freight for use in the repair of equipment, shops and enginehouses, was developed and a total cost computed using 1.23 cents per ton mile. The latter figure results from dividing all freight expenses and return on investment of Class I line-haul railroads, other than the portions

[35] Issued by the Cost Section as Statement No. 2-57 in July, 1957, as information. A revised edition was issued in November, 1963, as Statement No. 6-63.

applicable to per diem cars, by the total ton-miles of both revenue and non-revenue freight. A portion was assigned to ownership responsibility repairs on the basis of the distribution of the particular equipment maintenance account involved.

The various facilities used in accomplishing repairs, including shops and enginehouses, shop machinery, power plants; power plant machinery, power transmission systems, work equipment and miscellaneous equipment, were made the subject of special studies, as a result of which, a portion of their costs of maintenance, depreciation, taxes, and interest on investment was assigned to ownership costs of per diem cars. Depreciation was based on original cost and interest on depreciated original cost, using for the latter a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes. Depreciation, taxes and interest are not included in the total of $583,715,117, but are listed as separate cost elements and treated later herein.

B—*Bad Order Switching.*

Account 314 contains some of the costs of switching bad order cars, but not all. In developing the cost of this item, the Cost Section eliminated the amount of $6,673,463 appearing in Account 314, and substituted therefor $91,687,133, which it then separated between per-diem and non-per diem cars on the basis of the number of cars switched.[36] Separation of the per diem car portion between ownership and user costs was then accomplished on the basis of the cost of repairs. The substituted figure was computed by multiplying the total switch engine hours of locomotives engaged in switching bad order cars, developed from the special studies, by $49.08 per hour. Their hourly cost was taken from Rail Form A calculations for

[36] The ratios used were developed from the statistics obtained from the seven day test on Study Form No. 1.

the United States as a whole, and includes all costs, including overheads, related to switching, for both yard and road engines.[37] Southern Railway contends that total switching expense of bad order cars for 1960 does not exceed $84,192,071. This is based upon the assertion that nearly all such switching is accomplished by yard engines, having lower costs of operation than the average of yard and road engine switching. Southern's analysis of this cost uses a percentage of 5.241 obtained by dividing total switching hours of yard locomotives by total hours switching bad order cars. This percentage was then applied to costs of maintenance of equipment and transportation accounts of yard locomotives. Similar allocations of costs of water and fuel stations, shops, and enginehouses were made, and five percent taken of switching maintenance of way expense. Floating equipment expense was eliminated. Allocation of return on cars, shops, etc., was based on either 5.241 percent or the rounded figure of five percent. In distributing the total cost between home and foreign cars, and between ownership and user responsibility, Southern Railway employed the same method as did the Cost Section. When reduced to the cost per active car day, the difference in method used by Southern Railway results in a reduction of slightly over one cent below the repair figure calculated by the Cost Section.

There is no evidence in this proceeding as to the percentage distribution of switching of bad order cars as between road and yard engines. The special studies did not attempt to make this distinction since the Cost Section officials did not believe the refinement would produce significant results. On brief, Southern Railway suggests that further refinement is possible by more accurate determination of the switching hours of all locomotives. It appears not unlikely that the greater part of switching of

[37] Not including, however, such items as loss and damage, traffic, expenses, etc.

bad order cars would be accomplished by yard engines and that the cost may vary somewhat from that indicated by the nationwide average switching cost per hour. Southern Railway's analysis suggests that the actual cost may be somewhat lower when a greater portion is based on the costs of yard engines and that it is feasible to so refine the cost of this item. No party challenged the refinement as calculated. The difference in result, however, is relatively small when reduced to a daily basis and supports the Cost Section's decision to use the nationwide average cost for the purposes of its study.

The analysis made by Southern assumes that all bad order switching was done with yard locomotives. If the suggested refinement is to be accomplished in the development of costs of car ownership, a sample study will be required to determine the extent to which this type of switching is accomplished by yard and road locomotives. The Examiner recommends that, as a basis for future cost studies, a sampling be made and the suggested refinement accomplished. On the present record, however, there is no foundation for a finding as to the extent of departure of precise costs of switching bad order cars from the average costs of all switching. In these circumstances, and in view of the negligible impact on the ultimate daily cost, the average costs used by the Cost Section are found to be the more reliable.

C. *Train Yard Inspection, Etc.*

It is contended that train yard inspection is not conducted for purposes which should be related to per diem costs. The function, it is argued, is primarily concerned with transportation activities on the using line, rather than the determination of repairs related to costs of ownership. It is not denied that one of the purposes of such inspections is to determine whether repairs are needed, or that such repairs, when made, are of a type which frequently

fall within the sphere of ownership responsibility. The Commission has considered this contention on prior occasions, and none of the arguments in this record warrant any conclusion different from that heretofore reached.[38] The contention that no portion of depreciation of repair facilities should be apportioned to work on foreign cars, since such facilities would be maintained in any event to repair home cars, is an application of the marginal cost theory, not customarily accepted by the Commission. The same is true with respect to allocation of the expense of interest on investment in these facilities.

D—*Repair Deficiency.*

Remaining issues with respect to the special studies of 1960, and the resulting Cost Section analysis of repair costs, are concerned primarily with the distribution of costs between home and foreign per diem cars and involve the validity of an amount which, as calculated by the Cost Section, purports to represent the extent by which reimbursement by owners to users for ownership responsibility repairs made by the latter fail to meet the actual cost of such repairs. This is the so-called "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made either by the owner or user necessitated by improper use and handling of the car are not considered ownership responsibility items, and the costs are customarily borne by the railroad responsible. For the purpose of computing car rental charges, ownership repair costs are those made necessary by ordinary

[38] In *Chicago, R. & Q. R. Co. v. New York, S. & H. R. Co.*, 28 I. C. C. 291, 298, the Commission rejected the contention that the cost of inspecting per diem cars to determine the need, if any, for repairs, as well as the cost of inspection to determine the adequacy of repairs made, were not properly includible as maintenance items. The study there mentioned as necessary to separate out transportation expenses has been made. See Footnote No. 31, *supra*.

usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to reimburse to users for repairs made by the latter.[39] The figures used by the Cost Section in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully reimbursed users, and had thus borne themselves, all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners reimburse to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting car rental charges. Of the $858,715,117 of total ownership responsibility repairs for the year 1969, as computed by the Cost Section analysis, the distribution produced by the sample studies indicates that $186,482,539 was accomplished by user railroads and that $98,537,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1969, this amounts to 41.417 cents per day. A number of respondents challenge both the existence and magnitude of this figure.[40]

[39] The charges are actually designed for use of all situations when one railroad accomplishes repairs for which another is responsible.

[40] A restatement of the car repair deficiency by Southern Railway, eliminating about 21 million dollars in inspection costs, about 6.3 million dollars in depreciation and interest on repair facilities, and about 1.2 million dollars in cost of switching bad order cars and lesser related overhead items, produced a figure of $61,188,140. This restatement was offered without prejudice to Southern's position in opposition to employment of the deficiency as an offset in the per diem charge.

From the data obtained on Forms 2, 3, and 4, allocation percentages were developed for wages and materials used in repair of cars which were applied to the total expenditures for the year 1960. Of the reported labor costs in effecting repairs during the test period, some 18.8 percent were assigned to ownership repairs on foreign cars, while about 28.4 percent of material costs were so assigned. In apportioning total expenditures for the year however, the Cost Section applied the combined percentage for these two items, amounting to 25.618 percent, to the total amounts of both wages and materials. This produced a figure of $95,324,715 which constituted over 50 percent of the challenged expense of $186,482,539.

It is contended that application of the combined percentage to the total wages and materials cost for the year produced an excessive allocation to foreign car repair costs of some $7,839,374. Application of the wage and material percentages developed by the sample studies separately to the reported actual wages and materials in Account 314 for the year 1960, however, would not necessarily produce the more reliable result as alleged, since identical units are not involved. The Form 2 study of repair wages was confined to direct freight-train car repair wages which are charged to Account 314. It was restricted to wages paid to employees actually making repairs to freight train cars. Excluded from the study were wages paid to gang foremen, checkers, inspectors, billing repair card write-up men, train inspectors, employees engaged in reconditioning parts, crane operators, employees engaged in making tools and other general shop employees, portions of wages of employees working on mobile repair units, and supervisory employees not actually working on cars. Wages of employees engaged in reconditioning parts were included in the sample study as part of the cost of reconditioned parts installed on cars. The Form 3 material study was confined to materials directly applied to cars and excluded

materials used in reconditioning parts which were not directly applied to cars. Reconditioned parts, when used, were priced at scrap value plus a pro rata of labor, material and shop overhead applicable to reconditioning, including an allowance for freight transportation paid to others and a proportion of store expenses. It is apparent that the detailed separation of various wage and material items, with the assignment of portions of the former to materials cost for the purpose of the study made inappropriate the application of the specific percentages for each to the items of like title appearing in Form 3; and that the intermingling required the application of the combined percentage in assigning the annual cost of both wages and materials to the various categories. Conceivably, studies could have been devised to disclose many of the components in more detail, but there is no basis for concluding that they would have produced results any more accurate.

It is also contended that the Form 2 and 3 studies produced inconsistent results with respect to the relative amounts of wage and material costs, indicating inherent defects which render the sample results unreliable. In connection with this contention, exceptions are renewed to the refusal to receive in evidence five exhibits offered to show details of these amounts.[3] The Form 3 analysis of total actual charges to Account 314 for the year 1930 indicated that wages constituted about 48 percent thereof, and materials about 52 percent. Apportionments produced by the Form 2 and 3 studies were about 28 percent wage costs and 72 percent material costs. The rejected exhibits contained data and calculations showing the ratios of wage to material costs produced by these two studies, and the full year distribution from Form 3 for Account 314, for each of some ninety railroads. Thus, for example, testimony was received that Union Pacific reported on Form 2 the expenditure of some $2[illegible] for labor in

[3] Exhibits R-111, R-[illegible], R-113, R-114, and R-115.

repairing ownership items on foreign cars, and, on Form 3, some $310,133.77 for materials, a ratio of more than one to ten. At the same time, this carrier's Form 5 analysis of Account 314 for the year showed a ratio of about 1 to 1.7.

The analysis of Account 314, as reported by the carriers for each quarter and for the year, 1960, on Form 5, included in total wages, those paid to foremen, inspectors, checkers, clerks and other supervisory personnel applicable to Freight train car repairs made at shops, rip tracks, and mobile repair units, as well as an allowance for vacation and holiday pay. While the total wages necessarily included overtime pay, wages reported in the sample study were limited to straight time rates, whether or not the hours involved were overtime hours. The Form 2 and 3 studies were designed to develop the relative amounts of labor and materials employed as between five categories of activity, i.e., Owner responsibility (home cars), Owner responsibility (foreign cars), User responsibility (home cars), User responsibility (foreign cars), and all other freight train cars (including cabooses, etc.). They were not designed to measure individual fractions of the total yearly wage and material expense. Thus, the fact that, when expanded to a full year, the sample amounts fail to approximate the totals reported on Form 5 has no tendency to impeach their validity.

The comparisons made, and those sought to be made from data in the excluded exhibits, purporting to demonstrate inaccuracy or unreliability of the Form 2, 3, and 4 sample studies, are not persuasive. It is not contended that the individual carriers incorrectly reported the wages and materials on Forms 2 and 3, and the fact that activities on the Union Pacific over the 14 test days were such as to involve the application of materials having a total cost equal to more than ten times the direct wages paid on those days is without significance. Since the ratio of

all carriers was about one to three, it is apparent that the indicated extreme of Union Pacific experience was balanced out by that of other carriers. The sample was not intended to develop proportions for any single carrier. Development of the proportions of *direct* wage and material costs for each of the five categories of interest was accomplished to provide a basis for apportionment of a number of other costs, not reasonably susceptible of direct allocation. Respondents do not challenge this technique of cost analysis. The difference in the components of wage and material costs between Form 5 and the sample studies necessarily produces differences in the ratios as between the wage and material figures. A mere showing of such differences does not warrant a finding that the samples were defective. The cumulation of such examples by consideration of the excluded exhibits would add nothing.

Exhibit R-117 is a three page document containing a tabulation of Forms, 2, 3, and 5, data as reported by some 45 railroads, together with calculations showing, for each railroad, the percentages of reported material cost to labor cost as shown on each form. Exhibits R-311 through R-314 are reproductions of summary tabulations made by the Cost Section of reports of railroads on Forms 2, 3, 4, and 5. Each of the latter consists of 8 to 14 large sheets containing from 12 to 14 columns of data. Each was objected to by various parties on the ground that they had not been exchanged with all participants in advance of the hearing, and on or before the date provided therefor in the special procedure pursuant to which these cases were handled. The objections were sustained.[42]

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[42] Other exhibits which also were not exchanged on or before the dates applicable thereto were admitted, since no party objected. The acquiescence of all parties to these departures from the special procedures provides no precedent for permitting other departures where such acquiescence is lacking.

At the close of the last session of hearings in 1963, the procedure to apply to the further hearings was announced on the record. The renewed hearing were to commence on March 23, 1964, and all parties were to exchange their remaining direct evidence on or before January 6, 1964. By subsequent order of the Commission, the date for exchange of this evidence by all parties was extended to January 27, 1964. Exhibit R-117 was first exchanged with other parties at the time it was offered for identification at the hearing on April 20, 1964. On January 27, 1964, all the data underlying Exhibit R-117 had been available to all parties for well over a year in the files of the Cost Section. No satisfactory explanation was offered for the failure to make the exhibit available to all parties on or before the prescribed exchange date. Rules of special procedure made for the conduct of particular cases are designed to insure equitable treatment of all parties and should not be lightly disregarded. Here, it was expected that all parties would have approximately two months to study the direct testimony, and prepare for cross-examination and rebuttal. The objections to this exhibit were well founded.

At the close of the session of hearings held in the spring of 1964, the procedure to apply to the further hearings was also announced on the record. The renewed hearings were to commence on October 19, 1964, and all parties were to exchange their further rebuttal testimony and exhibits on or before September 21, 1964. By subsequent orders of the Commission, the date for exchange of this evidence was extended to September 28, 1964, and the date for resumption of hearings extended to October 21, 1964. Exhibits R-311 through R-314 were first exchanged with other parties on November 16, 1964, at the time they were offered for identification. The summary statements of which these exhibits were reproductions had been available to all parties for nearly two years. No satisfactory explana-

tion was offered for the failure to make them available to other parties on or before September 27, 1964. The special procedure was not satisfied by notifying parties on September 24, 1964, three days prior to the exchange date, that an attempt would be made to have these documents made part of the record by reference. This was attempted but objections of some parties defeated the proposal.

Notwithstanding the failure to comply with the special rules of procedure, it has been strongly urged, both at the hearing and on brief, that these exhibits should be received in evidence because they constitute summaries of the data received by the Cost Section upon which much of the cost analysis, and in particular the calculation of the repair deficiency, depends.[43] Full and intelligent consideration of the issues by the Commission is impossible, it is argued, unless these documents, and, in fact, all the data and calculations underlying the Cost Section analysis, are made part of the record and available for reference. This argument overlooks the fact that the conflicting interests of many different parties are involved in these cases and that fairness to all requires that all material upon which any one of them relies be brought forth on the record and the opportunity provided to produce, if possible, evidence which rebuts or explains it. All parties have had at least two years during which there was free access to all the material underlying the Cost Section analysis to extract and present anything which they consider benefits their position or aids the Commission. The volume of the record demonstrates that full advantage has been taken of this opportunity. The Cost Section and the Commission's Bureau of Inquiry prepared and presented in evidence all the materials related to the cost analysis which they considered of importance to the Commission in disposing of the issues. To permit last minute flooding of the record

[43] Or, in lieu thereof, it is requested that the Commission take official notice of their contents.

with masses of data with no specification or limit as to its use would invite fishing expeditions and the making of surprise arguments on briefs which opposing parties would have no opportunity to rebut, explain, or answer. As noted above, the only stated purpose for which Exhibits R-311 through R-314 were offered would not warrant the conclusions sought to be drawn therefrom. No convincing reason has been offered why the special rules of procedure should be waived for these exhibits over the duly registered objections of interested parties.

Monthly reports to the Association of American Railroads, by member carriers, for the years 1960 through 1962 indicate that, on the average, about 15 percent of cars awaiting light repairs were foreign per diem cars.[44] The Cost Section studies also indicated that foreign per diem cars in bad order and awaiting repair in 1960 averaged 18.802 percent of all bad order cars awaiting repairs. These figures, it is argued, demonstrate that an allocation of over 25 percent of the wage and material costs to such repairs is excessive. The cited statistics do not, however, provide any reliable indication of the relative numbers of cars actually repaired. The evidence warrants the conclusion that repairs to foreign per diem cars, on which per diem payments are accruing, are more likely to be made, while repairs to home cars can be made as needed. Thus, the cost section studies for the year 1960 indicate that, on an average, foreign per diem cars actually repaired and awaiting switching constituted some 37 percent of all cars in that category. Only rarely are heavy repairs made to foreign per diem cars, and it appears not unreasonable that the percentage of wage and material costs incurred by reason of light repairs to such cars should be less than the percentage of cars repaired.

The allocation in the Cost Section study of wages of car inspectors is also challenged as assigning an excessive por-

[44] AAR Form CS60A.

tion thereof to foreign car ownership costs. The total amount assigned to ownership costs, however, is not contested. The figures developed by the Cost Section studies indicate that it cost $25,687,329 to inspect foreign cars for ownership responsibility items, while the cost to inspect home cars for such items was only $18,058,710. At the same time, the wage and material repair cost for these two groups was $95,324,715 and $199,881,245, respectively. That the samples show more time of inspectors spent in inspecting foreign cars than home cars, although the repairs to the latter may have been much more costly, does not render the analysis of inspection work unreliable. There is no suggestion that the inspectors, in making their reports for the purposes of these studies, failed to report the distribution of their time and activities to the best of their ability, or that the results of that study were not accurately summarized. Foreign per diem cars, as indicated by the Cost Section studies, had a daily average car mileage of 58 miles, while home per diem cars averaged only 32.3 miles, a relationship quite similar to that between the inspection costs. More inspection would necessarily result from the additional interchanges. Substantially more extensive repairs are made to home than to foreign per diem cars and greater expenditures for this purpose result. It does not follow that inspection to determine the need for such repairs, or to ascertain the adequacy of the work accomplished, increases in proportion.[45]

The sample studies of repair costs were intended to separate from all costs, those which should be included in car rental charges because they were properly to be classified as the responsibility of owners. Costs in this

[45] The Cost Section study distributed the costs of car inspectors' inspection work between ownership and user responsibility on the basis of the costs of the ownership and user responsibility repairs made to the cars, and may possibly have understated the inspection expense of the ownership item.

category were subdivided between those incurred in respect to foreign cars and those incurred in respect to home cars. It is significant that the criticisms of these studies are directed to the latter separation. Other than switching, the total amount of ownership costs for both home and foreign cars, as indicated by the samples, is not challenged, yet the decision as to whether a particular repair was or was not an ownership item would appear to require far more judgment than the determination of the classification of the car as home or foreign.

These studies were the subject of extensive planning and review, not only by staff members of the Cost Section, but also by experienced officials of the railroads which conducted the actual sampling. The measurement of economic activities by use of appropriate samples is a customary procedure dictated by necessity where, as here, the volume of activity is large. All the studies in the present case, however, were based upon "judgment" samples, not only as to the stratification of the sample and form of data, but also, in many instances, the reported data itself was a judgment distribution as betwen different functions. Thus, the report of inspectors activities required each inspector to exercise his judgment as to the portion of his time spent on ten different functions, and the test days were chosen on a judgment basis. Forms 2, 3, and 7 were similar. The proportions of costs developed by these samples were used to allocate the actual expenditures for the full year 1960. In recent years there has been a substantial development of random sampling techniques, and the reliability of studies conducted pursuant to appropriately designed samples has been recognized by the Commission. In *Increased Parcel Post Rates*, 1957, 303 I. C. C. 59, 72, the Commission stated that "scientific or random sampling should be substituted for a series of samplings selected on the basis of the judgment of the Department's employ-

ces, no matter how capable the latter may be." See also *Reformation of Rates—Fourth-Class Mail*, (1964) 322 I. C. C. 1. Although so-called "judgment" samplings have been customary in the past, and necessary in the absence of better bases for conclusions, random sampling has the advantage of reliability within predictable limits. This is not available in judgment samples.

Whether scientific or judgment sampling is employed, it, as here, it is intended to ascertain the relative size of the various components of a universe, the methods must be so designed as to isolate into separate strata, for separate sampling, those elements which vary appreciably from others. Total ownership labor and material costs, both home and foreign, indicated by the Form 2, 3, and 4 samples constituted 99.33 percent of all the sampled costs. User responsibility labor and material costs amounted to 0.94 percent on home cars and 0.73 percent on foreign cars. The balance of 12.34 percent was applicable to cars other than per diem cars, and was excluded from further consideration. Some 98 million dollars of the costs assigned to repair of foreign cars are the result of applying to total wage and material costs for 1956, the factor of 2.61% per cent developed from these samples. The major part of this apportionment was derived from the Form 2 and 3 samples, comprised of reports of wages and material costs at about 69 percent of the railroad repair facilities in the United States for each of seven, two-day periods, scattered at about equal intervals throughout the year.[8] While this technique appears adequate to provide a measure of the distribution of costs between total ownership costs and total

[8] At 982 out of a total of 1381 points, including shops and repair tracks, on the total 708 points accounted for about 80% of the car repair payroll. On the remaining 173 points were locations where repair of a single type of car predominated. The rest were small facilities without such characteristics.

user costs, and probably to segregate expenses of per diem cars from those of other cars, it is not certain that it would develop properly the distribution of ownership costs between home and foreign cars.

Heavy repairs are accomplished in shops designed and equipped for this work. Such extensive repairs are rarely made to foreign cars, and the costs of these shops appear assignable in large part to repairs to home cars. The overwhelming majority of repairs to foreign cars are so-called "light" repairs, customarily accomplished at repair tracks or in shops with limited equipment, used primarily for such work. Light repair work on home cars is also generally accomplished at these locations. This type of repair is intimately connected with day to day transportation activities, and is spread fairly evenly over the years' operations. Presumably, it would be reasonably well represented in a sampling such as was done here. Heavy work, however, is scheduled at irregular intervals, as sufficient cars needing such work are gathered, and materials stocked, extra labor employed, etc. It appears that the proportion of costs at heavy repair facilities applicable to home cars would appreciably exceed the proportion developed at light-repair facilities. A sampling which did not adequately develop the amount and relationship of the costs as between these two strata would unduly weight the proportions used to distribute costs between home and foreign cars. Thus, if the sample did not pick up the

proper amount of heavy repair shop costs to develop their true relationship to costs at light repair facilities the result would be an unduly high allocation of total costs to foreign car costs. It cannot be found that the Form 2 and 3 samples produced an accurate measure of the proportions of costs attributable to home and foreign cars, but the evidence raises serious doubt as to the distribution resulting from their use. In the future, if such tests are made, more meaningful results would result from the use of carefully stratified random time samples of wage costs material costs, time of departure, distribution of activity between home, foreign, per diem and non-per diem cars, etc.

While there is room for doubt as to the exact amounts of the car repair deficiency, it is indisputable that there are certain elements of expense which might properly be assigned to the repair of foreign cars by AAR method, for which the AAR rules do not authorize reimbursement. Thus, the cost of inspecting foreign cars in order to ascertain the need for repairs which are owner's responsibility is appropriate for inclusion. Similarly, a proportion of labor costs resulting from so-called non-productive time might well be allotted to the repair costs of such cars. To the extent that such items are estimated as a percentage of labor cost, the same labor cost could be used as the base rather than merely the direct labor cost. The AAR charges do not include these elements nor do they include any allowance for investment in cars, sales taxes on materials, and costs of such as various types of work, personal injuries, stationery or printing.

The recommendation of reasonable compensation to the owner of a freight car for the costs of supplies and maintenance of a car which is not [illegible]

similar to those which exist in the car rental rate itself, and which fostered the present proceedings.

It is contended that by such general application of the repair deficiency the resulting inadequacy of remuneration to lines which accomplish greater repair to foreign cars in relation to car days on line of such cars, as noted above, would have the beneficial effect of discouraging unnecessary repairs. It is suggested that the present construction of the AAR charges for reimbursement omits certain elements of cost in order to produce such a repressive effect. While, as intimated by certain testimony, there may be some tendency on the part of some car inspectors to liberality in noting deficiencies requiring repair, which results in higher levels of repair shop work loads, the evidence does not support any finding to this effect. Whether or not it is the fact, the charges for car rental are not to be determined by the extent of their tendency to enforce the car service rules of the AAR. To the extent that they have an incidental effect of this nature, they accomplish a secondary result. That is not, however, their purpose, nor can the reasonableness of the charges be measured by any such yardstick. It is, indeed, conjectural whether the impact of the car rental charge would be felt at the operational level of car repair with any more force than the asserted deliberate inadequacy of reimbursement of the AAR charges.

The argument is made that allowance of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem charge allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four support the contention that the deficiency should be calculated and subtracted from the total ownership costs in determining the car rental charge.[32] None, including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only one, the Long Island Railroad, appears on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford appear to derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75, for repairs it made to their cars and paid the same lines $162,117.08 for re-

[32] The Boston & Maine Railroad, New York, New Haven & Hartford Railroad, Long Island Railroad and New Jersey & New York Railroad.

pairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times the unreimbursed costs in repair costs on its cars which it did not reimburse. The New Haven in 1960 received $32,716.00 for repairs which it made and paid the same lines $881,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.

It is clear that losses due to the repair deficiency are incurred only to the extent that a line accomplishes more repairs to the cars of another than that other carries out on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and are able to employ some selectivity in their choice of cars to supply to shippers. They are able to, and apparently do, exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars promptly to put them in condition to pass safely west of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been

considered necessary by that railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It is however, the only line suffering a loss from this situation which seeks to have it remedied by a reduction in the per diem charges.[55] As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by Class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Cost Section, this would indicate a possible unreimbursed amount, using the average figure, of some $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the

[55] The New Jersey and New York Railroad may occupy a similar position but the record is not clear in this respect. See, however, *New Jersey & N. Y. R. Co. v. Erie R. Co.*, 318 I. C. C. 555, 557.

repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repairs itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[56] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The experience of the New Jersey and New York Railroad in this respect is not shown.

It thus appears that none of the railroads, which suffer losses due to the repair deficiency, other than the four above-mentioned, consider the matter material. Those which have taken active part in this proceeding oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which urge use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines stand to obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding

[56] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's cars, but paid that line $13,842.48 for user repairs on its own cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

the losses they sustained in making under-cost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. This is not equity. It cannot be found that failure to deduct the alleged repair deficiency from the per diem charge would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

Car repair costs and associated maintenance expenses, as developed by the 1960 Cost Section studies and analysis have, for the purposes of this report, been grouped in the following list.

1.	Freight-train car repairs including allocation of inspection costs, non-revenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars	$583,715,117
2.	Depreciation on freight-train car repair facilities computed on undepreciated original cost	$ 8,023,021
3.	Property taxes on car repair facilities	$ 3,824,341
4.	Payroll taxes	$ 28,140,156
5.	Return on investment in freight-train car repair facilities computed at 4% (after income taxes) on depreciated original cost	$ 11,489,897
6.	Return on working capital	$ 2,896,316
	Total	$638,098,858

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. The latter figure, divided by 306 per diem payable days results in an average daily cost of $1.27. No dispute exists with respect to the amounts assigned to payroll taxes, property taxes on repair facilities, and return on working capital. Contentions regarding the use of reproduction costs and higher rates of interest with respect to depreciation and interest on investment in repair facilities are considered later herein. The Examiner finds that the ownership costs developed by the Cost Section studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities for 1960, are as accurate as could reasonably be obtained and fairly represent the costs for the period covered.

IV—Ownership Capital Costs

A—*Investment Base.*

Ownership costs, other than repair and maintenance costs, include the costs related to the acquisition of cars and the property taxes thereon.[57] Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for one year and an amount representing an interest return on the depreciated balance of

[57] While doubts have been expressed in the past, there appears to be no current controversy regarding the method used to estimate property taxes on freight cars. These are so varied from state to state as to make precise measurement impracticable. The amount is estimated by both the AAR and the Cost Section by use of a factor developed by taking a ratio of all property taxes to total investment, which is applied to the investment in freight cars. The factors for recent years have been as follows: 1948—0.977, 1950—1.005, 1952—0.976, 1958—1.123, 1960—1.163, 1961—1.083.

the cost. The calculations underlying the AAR rates prior to 1953 used the average original cost of the cars as the base for depreciation; thereafter the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight line method of depreciation has been used, at the average of rates used by carriers and authorized by the Commission, approximately 3.0 percent, except that in calculating the multi-level rates a flat three percent was used instead of the 3.06 percent average. Beginning with the studies underlying the $1.50 rate, in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. Studies underlying the $2.75 and later rates used depreciated reproduction cost as the base. In all instances, interest was computed at six percent before taxes.[58]

The analysis prepared by the Cost Section in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight line depreciation was used at a rate of 3.32 percent.[59] Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. The Cost Section calculated the depreciation charge on freight cars for 1960 at $197,060,088, to which it added $17,594,870 representing the depreciation which would have accrued on cars still in service but was not reported since they had been fully depreciated in the past.

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[58] This discussion is concerned solely with respect to freight cars. Depreciation and interest charges on investments in car repair facilities are considered subsequently.

[59] Salvage value was taken at 17 percent, and service value to be depreciated at 83 percent. Division of the latter by the assumed 25 years service life produces a rate of 3.32 percent.

The use of this traditional method of measuring this element of ownership burden gives rise to certain issues upon which the parties are irreconciliably opposed. Certain of the respondents, particularly those who are also defendants in Docket 31358, support the use of original cost as the base for both the depreciation charge and interest return. A number of respondents, primarily composed of the complainants in Docket No. 31358, support the use of reproduction cost for both purposes. The former group urges the use of an interest rate no greater than employed by the Cost Section, and preferably lower, while the latter group seeks the use of an interest rate of six percent after taxes, or higher. Southern Railway urges the use of original cost as a basis but would apply a 14 year service life for depreciation purposes, using a double declining balance method, and allowing interest of 8 percent before taxes. As an aid to the consideration of these issues, the Cost Section calculations include alternative amounts reflecting the use of reproduction cost as a base.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of railroad freight cars which has occurred in the past twenty years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the one dollar per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variances in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[60]

[60] Between 1915 and 1945 the Bureau of Valuation cost index for Account 53, Freight Train Cars, rose 154 points, an average of about five points per year. Between 1945 and 1960 the increase was 365 points, or nearly 25 points per year.

The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities between the cost basis of the existing fleet and that of the fleet of the future. In part, the problem is transitional, with old and cheaper cars still composing the major part of the fleet and having great influence, prior to 1964, on the measure of the per diem charge. It is apparent, however, that for the foreseeable future, wide disparities in the costs of various types of cars will continue to prevail, and the general similarity in the cost of freight cars which, prior to 1940, permitted the application of a uniform rental charge, cannot be expected. Since the ownership of most carriers varies as between types and numbers of cars, employment of a uniform charge, which averages the costs of all cars, cannot be expected to compensate them for their particular investments. Some graduation of rental charges appears unavoidable. A step in this direction was taken on January 1, 1964, when the multi-level scale of charges, based on car costs was instituted.[61]

Certain respondents contend that rates varying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, makes it

[61] Special provisions existed prior thereto applicable to certain cars. Thus additional loading surcharges were applied to the use of particularly expensive, heavy duty cars. Such arrangements may not be necessary with the use of a multi-level rate system based on car value but the record does not warrant a finding on this point.

necessary to apply varying rates in order to approximate the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization.[62] No studies were made with respect to this alleged distinction in the car day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

A similar conclusion is required with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average.

Certain evidence, developed in connection with the study of per diem payable days, suggests that car utilization, and perhaps repair costs as well, vary more reliably in relation to the type of car in use. Thus, line haul mileage per active car day, and per diem payable day, for TOFC cars

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[62] The difference, if any exists, appears to be more related to the age of the car than to its depreciated value. Some testimony suggests that very old box cars, the so-called "work-horses" of the fleet, may be held aside from general use normally but employed in cases of shortage or periods of high activity. Such practices would affect the car day divisor applicable to such cars but the record does not support a finding in this respect. It is also suggested that the newer cars have a higher car-mile utilization.

appears greater than for other per diem cars. At the same time, however, this added use apparently results in higher repair costs for such cars which would offset to some extent the benefit of the greater utilization. Whether the net result would vary appreciably from that produced by use of average figures is conjectural. The Commission would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs.[63] Appropriately designed scientific samples should be taken of both elements, however, to determine whether significant differences actually exist. If they do, separate calculations taking them into account would be indicated for future years.[64] That a more complicated process would result should not be a deterrent to equitable calculation and distribution of the ownership burden. The importance of simplicity in fact and appearance which prevailed in the past in connection with calculating per diem charges has largely disappeared with the advent of machine processing of data.[65]

Certain of the predominately terminating lines express a fear that in times of car surplus, originating lines will tend to employ the higher cost cars, regardless of the

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[63] In dealing with commercial matters, solutions which accomplish substantially fair results within a reasonable time may well produce more real justice than long delayed searches for minute accuracies.

[64] The car day divisor is an item of such importance in the development of unit costs that its calculation annually is imperative. The added effort necessary in taking sufficient periodic samplings to permit reasonably accurate estimates of active car days, surplus car days, and bad order car days, is justified by the importance of equitable distribution of the ownership costs.

[65] There is, of course, a practical limit to the extent of subdivision of rates. The ability of properly programmed computers to assimilate and apply a myriad of such factors is probably unlimited, but of more importance is the judgment of responsible officials as to the value of adding such factors.

freight revenue to be derived from the lading. Without doubt it would be possible to abuse the use of multi-level rates in this fashion but it cannot be found on the present record that such will occur.

The increasing interest in the use of reproduction cost as a base for calculation of the depreciation and interest on investment elements of per diem costs has paralleled the increasing cost of replacing cars since World War II. In prior years the more significant factor in the development of car rental rates was the repair and maintenance cost, since this, like the car day divisor, fluctuated more noticeably than did the cost of replacing cars. It also represented, proportionately, a greater part of the total costs. The marked increase in the capital outlay necessary to acquire replacement cars in recent years brought to the front the need to more accurately assess and provide for compensation for this element of the ownership burden. With the value of the average car largely influenced by the great number of old cars, use of reproduction cost as a base for calculation of depreciation and interest represented an attempt to provide compensation for higher capital costs of new cars.[66] In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, and in the first report in Docket No. 31358, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291, the Commission approved the use of this base. With the institution of the multi-level rates, designed to meet the ownership burden for cars in separate cost categories, however, the problem caused by the single average rate has disappeared. As users employ cars in the various value brackets, paying rental charges measured by their particular capital costs, they will neces-

[66] It cannot be overlooked, however, that the fleets of most car owners were comprised of both old and new cars. While indeterminate in extent, the inadequacy of the single rates to cover costs of the new cars was, at least in part, balanced by overcompensation on the older cars.

sarily be returning to the owners an appropriate proportion of the ownership burden generated by those cars. Use of the reproduction cost base can no longer be justified on this basis.

For many years there has been a continuing decline in the purchasing power of the dollars used to acquire cars, due to a continuing increase in the wages and cost of materials used in their construction. Many more dollars would be required to reproduce today a car originally built in the 1940's, and a car owner, receiving payments from car users in dollars of current purchasing power, does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the purchasing power of the dollars used, and may reasonably be expected to bear a share of that erosion. The use of reproduction cost as a base attempts to translate into dollars of today's value, the number of higher value dollars expended to buy the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually expended by the owner, by means of an appropriately constructed index, appears essential to fair compensation. Thus, to the extent that the car rental charge is comprised of a return of actual funds invested, whether measured by depreciation charges or otherwise, the contribution of users to the cost may be measured in dollars of purchasing power equivalent to those expended. It does not follow, however, that the blanket application of such an index to the original cost of the car may fairly be employed to expand any other element of the ownership burden.

Proponents of the reproduction cost basis point out the substantial increases in the cost of cars now being constructed, and stress that users of per diem cars should contribute to the extra cost of the car which will have to be pur-

chased to replace the car currently in use. In recent years the total number of freight cars in the national per diem fleet has decreased, although generally the carrying capacity per car has increased. Cars now being constructed are larger, more expensive, and have more modern and intricate equipment than the cars they replace. The improvement in their carrying capacity is multiplied by improvements in roadbeds, rails, engines, and operating practices. Generally, however, these latter factors are contributed by all using railroads and constitute a proportional contribution to the increased revenue producing capabilities of the new cars. So long as the contribution of users is measured by the costs of the car actually used, it cannot be denied that the higher costs will be rateably borne when the new car is put into use. It is contended, however, that unless car users also contribute in advance to the extra cost of the expected replacement cars, the entire risk of the investment will fall upon particular carriers, with a concomitant depressant effect on the incentive to undertake such investments. It is argued that the owner must take the risk of variations in the amount of use given the new car, by itself or other carriers; a risk associated with the level of economic activity and volume of traffic demand. A further risk, although one concededly not susceptible of measurement, is said to be the loss due to the unavailability of the car when needed by the owner, due to its being off line. These various factors, it is argued, should be included as appropriate elements of the cost of car ownership, to which users should contribute, and may be taken into account, at least in part, by use of reproduction cost as a base for interest on the depreciated balance of the cost.

Without doubt, a car rental rate which is inadequate to compensate owners for the use of their cars tends to dampen interest in the expansion of the fleets of individual carriers. The compensation which may be established by the Commission, pursuant to the provisions of Section

1 (14)(a) of the Act, must be reasonable, however, and cannot be based on conjecture. It cannot be found on this record that car owners actually incur measurable losses due to the failure to have new cars on their lines at particular times to meet traffic demands. Assuming, however, that situations do occur wherein opportunities to obtain and move freight are lost because the cars on line are insufficient in number, or in location, it does not follow that a contribution should be exacted from all car users to make the owner whole. Cars move off the owners' lines in interchange service when placed for such movements by the owner. All lines participating in the movement, including the owner, earn revenue from it.[67] The element of compensation here proposed is analogous to damages for tort, but, if the car is returned in reasonable course of time, then its availability to the owner in the interim is not the fault of any party to the movement. If the car is unreasonably delayed in its return, to the extent of violation of the car service rules, the matter is one to be handled as it arises by procedures apart from the car rental rates.

Assuming that a car owner has paid for the car with its own funds, and recovers each year a portion of its investment through inclusion of the depreciation charge, the inclusion of an interest return on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that amount should be inflated with the passage of time by application of an index purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternate investments would have undergone such appreciation, or any appreciation, or if they had, that the owners

[67] The value of the on-line use of the car to the owner is not a factor to be measured in determining the ownership burden.

would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternate investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

The compensation to which owners are entitled is for the car being used, not for the use of some better car which may be built in the future.[68] That changes in technology, design, size, and equipment, may make the subsequently acquired cars even more expensive is not improbable. The record demonstrates, however, that railroads do not make car for car replacements, nor do they set aside car rental receipts for the purpose of replacing existing cars. Whether replacement will be made by any particular carrier, the extent to which new cars will duplicate their predecessors, and more particularly, the extra cost of the replacement fleet due to such of the above-mentioned factors as may be effectuated makes advance estimation of the extra cost mere conjecture. It cannot be found that the increased interest return resulting from inflating the base by use of the reproduction cost index would have any rational relation to the amount of such additional cost.

Inasmuch as owners of cars can expect to be compensated, under the multi-level rate system, for their cost as they are used, the only argument for the advance payment of the extra cost of such cars is the effect on the incentive of carriers to invest in them. In the light of the evidence presented in these proceedings, this contention is not persuasive. It is generally conceded that railroads in this country do not purchase or build freight cars for the purpose of renting them to other carriers. The undertaking to pledge credit or commit present funds to the acquisition of revenue producing equipment is one faced by all enter-

[68] Section 1(14)(a) appears to permit no other conclusion.

prises. While it is true that the car owner engaging in a replacement program must incur, in the first instance, the burden of responsibility for the expenditures, which is not shared by the users, this condition inheres in the nature of the enterprise. Recompense for this burden is an element of profit, not cost, and should stem from the profits of the enterprise, derived from the revenue producing activity of the freight car.[69] It should not be sought from the joint users of the car whose duty, by definition and long accepted practice, is to bear their share of the costs. No reason appears why a user should contribute to the extra cost of a replacement car which may or may not be acquired in the future, and which it may never use, or, if it does use such car, then pay a rental charge based upon the same increased cost. The proposal is speculative, not susceptible of reasonable ascertainment, and would produce additional problems, equally conjectural in nature.[70]

Another ownership risk, for which compensation is sought by inflation of the interest return base, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This risk, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car day divisor excludes a

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[69] Some contribution by users appears in the allowance of interest on the funds actually expended by the owner to acquire the car. See *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684, 690.

[70] If users of present cars are required to pay more than is needed to meet the ownership burden on those cars, on the theory that they should contribute to the extra costs of a replacement car, it is apparent that, having contributed a portion of the investment in the new car, they should not be required to pay the owner an interest return thereon.

large percentage of home surplus and bad order cars, on owners' lines, while the dividend includes the costs of all cars.[71] The quotient is thus enlarged so as to spread over all days of active cars, a rateable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, not in use by reason of the above-mentioned risks, receive in the daily car rental payments for cars in active use a share of the costs of the idle cars.

Expenses of repairs and maintenance, and property taxes on freight cars are incurred annually, in dollars of substantially equivalent purchasing power as those received annually from users as contribution thereto pursuant to the prevailing car rental charges. The Examiner finds that no justification whatsoever has been shown for enlarging the base upon which interest on investment is computed and that the unreturned balance of the owner's original expenditure should be used therefor. Application of an appropriate index reflecting the loss in purchasing power of the dollar to that portion of the ownership burden represented by the actual cash outlay of the owner is found to be proper in order to equitably share the impact of such changes.[72]

Included in ownership cost is an allocation of a portion of charges for depreciation and interest on repair facilities, including shops, enginehouses, powerplants, etc. It has been customary, and the Commission in its prior report in Docket 31358 approved the use of original cost as a base for calculation of depreciation on these facilities. The

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[71] Thus, in 1960, the per diem payable days excluded 86.5 percent of the home surplus and bad order cars, thus spreading their costs over the lesser number of cars in use, at a higher cost per car day.

[72] In effect, the car should earn each year a share of its cost, measured in dollars which would buy that same share of the car as did the dollars originally spent.

depreciation rates vary, due to the substantially longer life of the facilities and variances in their character. No issues have been raised with respect to this charge. Interest on the depreciated investment in repair facilities has been computed, in recent years, upon a depreciated reproduction cost base, also approved in the last report. The discussion above, with reference to the interest base for freight cars, is equally applicable to these facilities. When reduced to an amount per car day, the figure is relatively small. Nonetheless, no justification has been shown for enlarging the dollar value of the investment in repair shops, etc., by application of the index of freight-car construction costs. The connection is, if possible, even more remote than that enjoyed by freight cars.

The cost index employed in the development of reconstruction costs by the AAR is challenged by the Boston & Maine and New Haven as including the costs of a number of improvements to particular parts of the car, and thus not truly representative of the cost in current dollars of reproducing the car as originally built. This index is the product of a joint effort with the Commission's Bureau of Accounts, Section of Valuation,[73] and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indices are published by the Section of Valuation to correspond with specific primary accounts of railroads, as listed in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, Freight-train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-1914 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

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[73] *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, 403.

While the record contains little by way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that, although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, etc., which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted.[74] If this index is employed to measure the loss in purchasing power of money, it should reflect only the increased cost of building the precise car in which the funds were originally invested. It is not important that no carrier would actually reproduce such a car; the goal is to measure the cost of reproduction in order to estimate the contribution in present dollars necessary to equate the dollars actually invested in that car. To the extent that the index is inflated by the current cost of improvements and design advances, not a part of the original car under consideration, its reliability as a measure of inflation is diminished.

Attention is called to the wholesale and consumer price indices developed by the Department of Labor, Bureau of Labor Statistics, and published in the 1964 Statistical Abstract. These indices were not introduced in evidence but, on brief, official notice thereof was requested. Such notice is permissible and will be taken.[75] See *Missouri*

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[74] It is argued that other improvements which form integral parts of new cars include such items as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler design and draft gear design advances.

[75] In view of the conclusions reached herein, the Examiner is of the opinion that no party has been prejudiced by this action. Attention is called, however, to Section 7(d) of the Administrative Procedure Act, 5 U. S. C. §1006.

Pac. R. R. Reorganization, 282 I. C. C. 629, 643; *Increased Freight Rates,* 1951, 284 I. C. C. 589, 596. Reduced to a common base, using the 1920 to 1939 period as 100, it is shown that the Account 53 freight car index rose from 118 to 346 between 1940 and 1961, the consumer price index rose from 88.22 to 188.39, and the wholesale index from 86.99 to 202.91. From 1961 to 1963, the freight car index remained at 346, the consumer index rose to 192.91, and the wholesale index rose to 213.52, then dropped back to 202.91. The freight car index thus rose about 350 percent, the consumer index, about 218 percent, and the wholesale index, about 233 percent. Although the overall average of wholesale and consumer prices did not rise to the same extent as freight car prices, the former are composite figures covering a great number of commodities, and the comparison is inadequate to support any finding as to the extent by which the latter may be excessive.

For many years, the Joint Equipment Committee of the AAR has issued annually a report on costs of railroad equipment and machinery which has included, inter alia, the same price index for Account No. 53 as the publication of the Section of Valuation, as well as statistics on the delivered cost of freight cars and other equipment for the current year. Pursuant to Freight Car Rule 112 (Section B) of the AAR Code of Rules for the Interchange of Traffic, this index and data are employed by railroads in specified instances to calculate the payment to be made for destroyed cars.[76] For the present, the Account 53 index

[76] Paragraph No. 3 of this rule provides "Where per pound settlement prices are not provided and the rules specify settlement on reproduction cost basis, cost of reproduction in kind at date of destruction shall be obtained by adjusting the original cost to date by the relation of costs as between those in the year built and in year prior to date destroyed, on basis of percentages of costs as issued by Joint Equipment Committee—Costs of Railroad Equipment and Machinery—published by the AAR Finance, Accounting, Taxation and Valuation Department, Washington, D. C. . . ."

must be accepted as the best available evidence of the increased cost of constructing freight cars, with the recognition that it is, to some indeterminate extent, inflated by reason of the inclusion of factors mentioned above. For the future, it would appear advisable to determine whether there is, in fact, a need to seek further refinement of this index, so as to reflect, so far as practicable, the change in cost of constructing the same cars, and to eliminate the costs of improvements not used on the base year cars.

B—*Interest Rate.*

The amount which an owner receives to compensate for the use of funds which it has invested in the freight car depends both upon the magnitude of the base and the interest rate applied to it. Certain respondents urge that the rate should be not less than 6 percent after tax, based upon depreciated reproduction cost. Southern Railway, while advocating use of the depreciated original cost base, seeks an interest rate of 8 percent before taxes. The AAR staff has regularly employed an interest rate of 6 percent before taxes based, in recent years, on depreciated reproduction cost. The Cost Section analysis followed Rail Form A, and computed interest at a rate of 4 percent after tax, equivalent to about 6.62 percent before tax, based upon depreciated original cost. The defendants in Docket 31358 assert that the latter amount is the highest that can fairly be allowed.

In both the 1949 and 1955 decisions, the Commission held that a return of 6 percent before tax based on depreciated reproduction cost would be proper. Apparently this conclusion, as noted above, was influenced by the view that the single average rate, based on the preponderance of older cars, failed to meet the capital requirements involved in replacing the fleet with modern cars.[77] With the advent

[77] Cf. *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I. C. C. 291, 302. See footnote No. 66.

of multi-level rates there is no necessity for use of this device to compensate car owners and no persuasive reason has been offered for inflating the investment base in this fashion. In lieu of inflating the base, however, there arises the demand for a higher interest rate, having the same result. The same arguments with respect to risks of the entrepreneur are made in support of higher interest rates as were employed with respect to inflation of the rate base. When these entrepreneurial risks are reduced to specifics, however, they are shown to be shared by all users as a result of the manner in which the total costs of all cars are spread over the payments made for cars in active use.

Compensation for having exercised the initiative and pledged the credit necessary to purchase or build the car should come from the profits of the operation, the source of which is the income from freight rates, not the balance of payments arising from car rental charges. A fundamental distinction exists between the fair return on investment which should be received from customers of the railroad, through the freight rates, and the amount of interest on investment which should be contributed by the various users involved in performing the transportation service. The considerations which support the use of the present value of the assets devoted to the service by the owner as a base for charges to the former are not applicable. They do not contemplate the mutual sharing of costs.

Certain respondents point to reported earnings of between 8 and 9 percent before taxes of some private car line companies and suggest that these provide a persuasive guide to the interest rate which should be allowed. The data with respect to these companies is indefinite, due to their freedom to follow varied accounting practices, but it is conceded that the reported return includes the profit from operations. This is not an element which car users may be required to pay. No evidence, other than the unsupported opinion of some witnesses, was offered to support

the suggested return of 6 percent after taxes based on depreciated reproduction cost. The return of 6.62 percent before tax used by the Cost Section, and based on depreciated original cost compares with the return in 1960 earned by railroads from freight service of 5.36 percent before tax, 4.5 percent after tax, based on the depreciated cost of road and equipment. No reason appears why car users, not required to contribute to profits, should pay a higher rate of interest on investment than customers of the service who necessarily are the source of profits. It is significant that in the analagous situation of reciprocal switching charges, the Commission has held that the charges should be based upon actual cost. *Switching at Richmond, Va.*, 245 I. C. C. 293, 298. In recent cases it has been held that interest on original cost at 4 percent after taxes was adequate to provide a fair return for a service of this mutual nature, and that a return of 6 percent was unduly high. *Switching Charges at Detroit, Mich.*, 301 I. C. C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I. C. C. 477, 485. The rate of interest employed in the Cost Section analysis is found to be reasonable and adequate to compensate car owners for all elements of cost which should be shared by car users.

C—*Measurement of Investment Costs.*

Since the car owner is to be made whole for the financial burden it incurs and the car user is to bear the same financial burden it would incur if it owned the car, some rational measure of this burden must be established. No reason appears why it must be measured by use of accounting devices customarily employed for the maintenance of corporate records. The car should earn for the owner each year a portion of the capital expended for its purchase, together with interest on the unreturned balance, as well as funds necessary to make payments of principal and interest on any amount borrowed to finance the purchase.

The use of an annual depreciation charge plus an allowance for interest on the depreciated balance of the cost does not provide a reliable measure of the needed amount under the circumstances present in this case. These criteria, specified in the McCrea Commission report in 1909, were undoubtedly adequate to measure capital costs at that time. In 1907 the average car cost was $721.96. The range of car costs at that time was approximately $1,200, from about $378 for the cheapest to about $1,602 for the most expensive. Today the range is closer to $35,000, or more. The 1907 ratio between the cheapest and most expensive cars in the fleet was about 1 to 4 compared to about 1 to 15 in 1960. A more precise measure of capital costs is necessary under present conditions.

The evidence requires the finding that few carriers finance the entire cost of purchase or construction of new cars out of retained funds. Commonly the larger part of the needed amounts is obtained through loans secured by equipment trusts or conditional purchase agreements. Not infrequently, the term for repayment of principal is 15 years, with interest on the unpaid balance varying between 2 and 6 percent.[78] While the actual portion of the cost borne by the owner in the first instance varies widely, the most common is twenty percent. The Cost Section analysis developed that approximately 37 percent of the depreciated investment in freight cars, in 1960, based upon original cost, was represented by their outstanding equipment obligations. Data reported in the special studies indicated an average interest rate of 3.849 percent. Tables 1 and 2, below, indicate that where recovery of capital cost is spread over a 15 year period, costs produced by use of charges to depreciation and interest on the depreciated cost (Table 2) greatly exceed those which reflect the impact of financing 80 percent of the cost. (Table 1). Per diem

[78] Rates of about 4½ percent are said to be obtainable currently.

rates designed to reflect costs based upon Table 2 would require excessive payments by users to the extent that the actual burden was more accurately represented by Table 1. A similar comparison appears in Tables 3 and 4, where the recovery of capital cost is spread over a 30 year period.[79]

Where an owner finances the larger portion of the cost of new cars by borrowings which must be repaid, with interest, within a specified period of time, such as 15 years, reasonable compensation for proportional use of the cars by other carriers should be measured by the same term of years. Users, undertaking the same burden would have to repay in that period, and, in principle, should contribute on the same basis. Return of the owner's capital actually invested should reasonably be accomplished within the same period. Similarly, in those instances where an owner has provided, from its own funds, the full cost of new cars, there are persuasive reasons why the same period for return of capital should be employed. The time required to recover the capital invested in a piece of revenue producing equipment is of great significance in the financial planning of any enterprise. The longer this time span, the more conjectural the prospects for return and the more speculative the investment. The long-recognized propriety of a return of 6 percent on investments contemplates a recovery of the invested amount in less than 17 years.

As a guide to the extent of the burden assumed by car owners, there are set forth below, two tables showing, for each $1,000 of investment, the annual cost over a 15-year period. Table 1 assumes a 20 percent payment by the

[79] When consideration is given to the cost to the owner of carrying for the additional 15 years, the difference between payments indicated for a 15 year spread and for a 30 year spread, i.e., comparing tables 2 and 3, and, 1 and 4, Table 3 is shown to indicate rates slightly higher than required and Table 4, rates slightly lower than necessary, but the difference does not affect the principle.

owner and shows the annual charges for payments of principal on the borrowed amount, interest charges thereon at 4.5 percent, a proportionate return of the owner's cash payment and interest at 6.62 percent on the unreturned balance of the down payment. Table 2 assumes payment by the owner of the full cost of the car, with return of principal and interest on the balance, also at 6.62 percent, to be received in a similar 15 year period.[80] Each table allows ten percent of the original cost as salvage value and property taxes have been estimated at 1.163 percent of the mid-year value of the car, assuming a straight line method of depreciation over a 15 year period. In order to approximate the reduction in purchasing power of the funds received annually as contribution to return of principal, an increasing cost index progression of four points per year has been assumed. This is slightly less than the average indicated by the Section of Valuation index over the 15 year period from 1948 through 1962.[81]

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[80] Table 2 also indicates the approximate results of calculating an annual charge to depreciation, adjusted for reproduction costs, and allowance of interest on the depreciated original cost.

[81] These tables, and particularly these estimated cost indices are designed only to provide an indication of the method and approximate pattern of reimbursement per $1,000 of original cost to which owners may be entitled. Actual figures will require regular study and revision, as hereinafter discussed.

TABLE 1

APPROXIMATE ANNUAL COST PER $1,000 OF INVESTMENT

Car Age	Loan $800.00		Cash $200.00						Five Year Averages
	Princ.	Int.[1]	Princ.[2]	Index [3]	Adj. Princ.	Int.[4]	Taxes [5]	Total	
1	$53.33	$34.80	$6.66	1.00	$ 6.66	$13.02	$11.28	$119.09	
2	53.33	32.40	6.66	1.04	6.93	12.58	10.58	115.82	
3	53.33	30.00	6.66	1.08	7.19	12.14	9.89	112.55	$112.55
4	53.33	27.60	6.66	1.12	7.45	11.70	9.19	109.27	
5	53.33	25.20	6.66	1.16	7.72	11.26	8.49	106.01	
6	53.33	22.80	6.66	1.20	7.98	10.82	7.79	102.72	—
7	53.33	20.40	6.66	1.24	8.23	10.38	7.09	99.43	
8	53.33	18.00	6.66	1.28	8.49	9.94	6.40	96.16	96.16
9	53.33	15.60	6.66	1.32	8.76	9.50	5.70	92.89	
10	53.33	13.20	6.66	1.36	9.02	9.06	5.00	89.61	
11	53.33	10.80	6.66	1.40	9.29	8.62	4.30	86.34	—
12	53.33	8.40	6.66	1.44	9.55	8.18	3.61	83.07	
13	53.33	6.00	6.66	1.48	9.82	7.74	2.91	79.80	79.80
14	53.33	3.60	6.66	1.52	10.08	7.30	2.21	76.48	
15	53.38	1.20	6.76	1.56	10.35	6.86	1.51	73.26	

1—Computed at 4½ percent on the mid year balance.
2—Based on $100.00 to allow for ten percent salvage value.
3—Estimated at an average annual increase of 0.04.
4—Computed at 6.62 percent on mid year balance.
5—Computed at 0.01163 times mid year value. See Exh. R-1, Pg. 73, Col. 3, Line 5.

TABLE 2

Approximate Annual Cost Per $1,000 of Investment

Car Age	Depreciation or Principal	Index [1]	Depreciation or Adj. Principal	Interest [2]	Taxes [3]	Total	Five Year Averages
1	$60.00	1.00	$60.00	$64.21	$11.28	$135.49	
2	60.00	1.04	62.40	60.24	10.58	133.22	
3	60.00	1.08	64.80	56.27	9.89	130.96	$130.96
4	60.00	1.12	67.20	52.29	9.19	128.68	
5	60.00	1.16	69.60	48.32	8.49	126.41	
6	60.00	1.20	72.00	44.35	7.79	124.14	—
7	60.00	1.24	74.40	40.38	7.09	121.87	
8	60.00	1.28	76.80	36.40	6.40	119.60	119.60
9	60.00	1.32	79.20	32.43	5.70	117.33	
10	60.00	1.36	81.60	28.46	5.00	115.06	
11	60.00	1.40	84.00	24.49	4.30	112.79	—
12	60.00	1.44	86.40	20.51	3.61	110.52	
13	60.00	1.48	88.80	16.54	2.91	108.25	108.25
14	60.00	1.52	91.20	12.56	2.21	105.97	
15	60.00	1.56	93.60	8.59	1.51	103.70	
After 15 years				6.62	1.16	7.78	7.78

1—Estimated at an average annual increase of 0.04.
2—Computed at 6.62 percent on mid year balance.
3—Computed at 0.01163 times mid year value. See Exh. R-1, Pg. 73, Col. 3, Line. 5.

While precise reimbursement of the ownership burden would seem to require proportionate contribution of the costs of ownership in the same amounts and within the same period of time, that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a thirty year period, the impact of car hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the thirty year period have been greater than would have been received by using a shorter period.[82] In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of this discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and return on depreciated investment in freight cars represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

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[82] AAR rate calculations use approximately 3 percent per year of the cost of the car as the charge to depreciation.

In this proceeding, only Southern Railway urges the use of the shortened period of 14 years to reimburse the owner's capital costs. None other of the several hundred common carriers by railroad which are parties to this proceeding support this change in the prevailing 30 year period. On brief, the 20 road group urges that the depreciation period be continued at 30 years for cars in the lower three value groups, and that a period of 20 years be employed for cars in the higher groups. It does not appear that any suggestion to this effect was made to the AAR at the time the multiple-level rates were being calculated by its staff nor did the proponents urge or offer evidence in its support during the hearings. The Examiner does not consider either proposal practicable at this time. The record herein demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over twenty years old, and over 49 percent were over fifteen years old. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use.[83] Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

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[83] Of some 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,938, or 17.92 percent of the total. No tendency to a reduction in the useable life of cars is indicated. The record shows depreciation rates on freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent.

Attention is called to the fact that recent revisions of regulations of the Treasury Department, permit railroads to employ a 14 year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value apparently comprises only a portion of the total involved. In view of the facts of record as to the periods over which freight cars are retained in use, no weight can be accorded to the conclusions sought to be drawn from the action of the Treasury Department.[84]

If the return of the owner's investment is to be spread over a thirty year period, however, some recognition must be given to the burden of carrying the investment over the longer period. To the extent that the owner has financed the car with borrowed funds, it need recover annually only the amount of payments of principal and interest, the former, without provision for inflation,[85] and

[84] It appears that the benefit of the shorter period for write off of capital expenditures is subject to proof by the carrier that it is satisfying the prescribed standards within a specific period, and that a number of carriers are seeking an extension of the period in which such proof may be made. The test apparently is based upon dollar totals rather than with reference to the lives of specific equipment.

[85] Since the funds are received and paid annually in dollars of purchasing power the same as the owner must pay annually to the underwriters.

the latter at the actual rate of interest applicable thereto. On its own cash investment, it should receive proportionate payments to cover return of principal and interest, the former adjusted for inflationary effects and the latter at 6.62 percent before taxes. Since borrowed funds generally are repayable in 15 years, on a 30 year basis the owner must necessarily carry the difference in payments, which it should recover during the final 15 years. If the owner has paid the full cost of the car, it should receive its return of principal within the same period, and, on a 30 year basis is required to carry the difference over the longer period. Where compensation is received over the longer period, return of capital outlay should be adjusted for inflation over the entire period, with interest at 6.62 percent on the unreturned balance. Table 3, below, shows the annual costs, calculated in the same manner as Table 2, but employing a 30 year period for recovery of the original cost. This table, which assumes full payment of the original cost by the owner, is, in result, similar to calculation of the depreciation charge on a reproduction cost base, and allowance of annual interest on the depreciated balance of the original cost.

In order to give recognition to the difference in the ownership burden resulting from the customary practice of financing the larger part of the cost of purchasing or constructing cars, Table 4, below, shows in similar fashion, the capital costs over a 30 year period, assuming a 20 percent cash payment by the owner and 80 percent financing. While there are instances in which equipment acquisitions are made without cash payment by the owner, there are others in which the payment exceeds 20 percent. The Examiner finds that Table 3 and 4 fairly represent the extremes of ownership burden for the included items and provide a reasonable measure thereof.[86]

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[86] See Footnote No. 79, supra.

TABLE 3

1	2	3	4	5	6	7	8
Years Installed [1]	Return of Cost [2]	Index [3]	Adj. Return [4]	Interest [5]	Taxes [6]	Total [7]	Five Year Averages
1	$30	1.00	$30.00	$65.21	$11.43	$106.64	
2	30	1.04	31.20	63.22	11.08	105.50	
3	30	1.08	32.40	61.24	10.73	104.37	$104.37
4	30	1.12	33.60	59.25	10.38	103.23	
5	30	1.16	34.80	57.27	10.03	102.10	
6	30	1.20	36.00	55.28	9.69	100.97	
7	30	1.24	37.20	53.30	9.34	99.83	
8	30	1.28	38.40	51.31	8.99	98.70	98.70
9	30	1.32	39.60	49.33	8.64	97.56	
10	30	1.36	40.80	47.34	8.29	96.43	
11	30	1.40	42.00	45.36	7.94	95.29	
12	30	1.44	43.20	43.37	7.59	94.16	
13	30	1.48	44.40	41.38	7.25	93.03	93.03
14	30	1.52	45.60	39.39	6.90	91.89	
15	30	1.56	46.80	37.40	6.56	90.76	
16	30	1.60	48.00	35.42	6.22	89.64	
17	30	1.64	49.20	33.43	5.87	88.50	
18	30	1.68	50.40	31.45	5.52	87.37	87.37
19	30	1.72	51.60	29.46	5.18	86.24	
20	30	1.76	52.80	27.47	4.83	85.10	
21	30	1.80	54.00	25.49	4.48	83.97	
22	30	1.84	55.20	23.50	4.13	82.83	
23	30	1.88	56.40	21.51	3.78	81.69	81.69
24	30	1.92	57.60	19.53	3.43	80.56	
25	30	1.96	58.80	17.54	3.08	79.42	
26	30	2.00	60.00	15.55	2.73	78.28	
27	30	2.04	61.20	13.56	2.38	77.15	
28	30	2.08	62.40	11.58	2.03	76.01	76.01
29	30	2.12	63.60	9.59	1.68	74.88	
30	30	2.16	64.80	7.61	1.33	73.74	
After 30 Years				0.62	1.16	7.78	
					30 Year Total —	$2,705.84	

1—Age of car in years of per diem service.

2—Less 10 percent salvage value.

3—Approximated cost increase index for purposes of this table. Actual index will require annual determination, and substitution herein.

4—Amount to equate in dollars of current purchasing power, the dollars actually expended to purchase or build car.

5—Computed at 6.62 percent before taxes on balance of full cash payment.

6—Computed at .01163 of mid-year value; based on original cost.

7—Per $1,000 of original cost. Sum of Columns 4, 5, and 6.

TABLE 4

	Loan $800.00		Cash $200.00						
1	2	3	4	5	6	7	8	9	10
Car Age [1]	Princ.	Int.	Princ.[2]	Index [3]	Adj. Princ.[4]	Int.[5]	Taxes [6]	Total [7]	5 Year Averages
1	$26.66	$35.40	$3.33	1.00	$3.33	$13.13	$11.43	$89.95	
2	"	34.20	"	1.04	3.46	12.91	11.08	88.31	
3	"	33.00	"	1.08	3.60	12.69	10.73	86.68	$86.68
4	"	31.80	"	1.12	3.73	12.47	10.38	85.04	
5	"	30.60	"	1.16	3.87	12.25	10.03	83.41	
6	"	29.40	"	1.20	4.00	12.03	9.69	81.78	
7	"	28.20	"	1.24	4.14	11.81	9.34	80.15	
8	"	27.00	"	1.28	4.27	11.59	8.99	78.51	78.51
9	"	25.80	"	1.32	4.41	11.37	8.64	76.88	
10	"	24.60	"	1.36	4.54	11.15	8.29	75.24	
11	"	23.40	"	1.40	4.68	10.93	7.94	73.61	
12	"	22.20	"	1.44	4.81	10.71	7.59	71.97	
13	"	21.00	"	1.48	4.95	10.49	7.25	70.35	70.35
14	"	19.80	"	1.52	5.08	10.27	6.90	68.71	
15	"	18.60	"	1.56	5.22	10.05	6.56	67.09	
16	"	17.40	"	1.60	5.35	9.83	6.22	65.46	
17	"	16.20	"	1.64	5.49	9.61	5.87	63.83	
18	"	15.00	"	1.68	5.62	9.39	5.52	62.19	62.19
19	"	13.80	"	1.72	5.76	9.17	5.18	60.57	
20	"	12.60	"	1.76	5.89	8.95	4.83	58.93	
21	"	11.40	"	1.80	6.03	8.73	4.48	57.30	
22	"	10.20	"	1.84	6.16	8.51	4.13	55.66	
23	"	9.00	"	1.88	6.30	8.29	3.78	54.03	54.03
24	"	7.80	"	1.92	6.43	8.07	3.43	52.39	
25	"	6.60	"	1.96	6.57	7.85	3.08	50.76	
26	"	5.40	"	2.00	6.70	7.63	2.73	49.12	
27	"	4.20	"	2.04	6.84	7.41	2.38	47.49	
28	"	3.00	"	2.08	6.97	7.19	2.03	45.85	45.85
29	"	1.80	"	2.12	7.11	6.97	1.63	44.22	
30	"	0.60	"	2.16	7.24	6.75	1.33	42.58	
After 30 Years						6.62	1.16	7.78	7.78
							30 Year Total	$1988.06	

1—Age of car in years of per diem service.
2—Less 10 percent salvage value.
3—Approximated cost increase index for purposes of this table. Actual index will require annual determination, and substitution herein.
4—Amount to equate in dollars of current purchasing power, the dollars actually expended to purchase or build car.
5—Computed at 6.62 percent before taxes on balance of full cash payment.
6—Computed at .01163 of mid-year value, based on original cost.
7—Per $1,000 of original cost. Sum of Columns 2, 3, 6, 7, and 8.

During the period that capital costs are being paid, all users, including the owners, should contribute according to the extent of use each makes of the cars. No reason appears why, during the pendency of this period, any radical differences should exist between payments for different years, except those that are the product of changes in the financial burden of the owner. As appears by Tables 1 through 4, there is a gradual reduction in the interest and tax charges, which is partly off set by the impact of inflationary forces on the unpaid balance of the principal amount invested by the owner. Separate computations on an annual basis, however, do not appear essential to equitable distribution of the charges, and averages of four or five year periods, as suggested by Southern Railway, constitute a practicable reduction in detail. Upon termination of the period when capital costs other than salvage value have been recovered, no reason appears why users should then pay for the costs other than taxes, repairs and maintenance, and interest on the remaining value of the car dedicated to the service. An appreciable reduction in the rental rate would then occur, but would be rationally the product of the reduced burden of the owner.

In recent years, increasingly greater sums have been expended for hire of freight cars from non-railroad owners. In 1953 the reported amount was $9,431,201. In 1959 it had risen to $32,890,216, and by 1962, to $68,949,490. These costs arise from the provisions of numerous contracts entered into independently by various railroads, the details of which are not of record. The extent to which the rental costs of such cars are compensated, by use of capital costs calculated as described above cannot be ascertained, and it is necessary to assume, for the present, that the difference, if any, would not be significant.[87] Car

[87] Thirty-three leases by 10 railroads with Equitable Life Assurance Society between 1950 and 1962 indicate rental charges which would be reimbursed by rates based on costs calculated in this

owners, i.e., lessees of such cars, have not found it necessary to make special provision for recovery of this element of cost under past rates.

Upon all the evidence, the Examiner finds that the costs related to the acquisition of cars, and the taxes thereon, can most reasonably and accurately be determined in the fashion indicated by Table 4. It is found that costs determined by use of a depreciation charge and allowance of interest on the undepreciated balance of the cost of the car, do not provide a reliable measure of the ownership burden for these items, result in payments which are in excess of reasonable compensation, and are unjust, unreasonable, and unfairly discriminate against users of foreign cars.

V—Present Multi-Level System

The multi-level rate system introduces for the first time a long range concept of per diem charging, which contemplates the recovery of capital costs over the period in which the car is depreciated. This concept requires that the method be tested, not only with reference to the reasonableness of charges provided for the present period, but also with reference to its overall effect and its adequacy to accomplish the intended results.

For the purposes of the comparisons which follow, the figures developed in Tables 3 and 4 have been employed as a guide, per diem payable days per car taken at 306, and annual repair costs at $390.00 [88] As heretofore noted, the

[88] By reference to the 1960 figure of $388.80. Summary T-1 calculations from the Form H formula indicate average repair costs per car of some $372.00 in 1961 and $398.00 in 1962. The latter figures are derived by dividing the total repair and maintenance figures of $594,394,469 and $613,895,199, in Exhibits R-245 and R-246 by the average number of per diem cars in use. The latter figure derived by taking 97 percent of the average of all cars at the beginning and end of year.

use of the same repair cost and car day divisor for all cars is criticized by some respondents as productive of substantial inaccuracies. There are, however, no statistics upon which to base any findings in these respects. Until such time as reliable information is available with respect to these two factors, it is necessary to rely upon the average figures. Those developed by the Cost Section studies are the best available in this record and will be employed, in connection with the investment costs to approximate the ownership burden. Set forth below are the present multi-level rates, as most recently revised, together with the revenue therefrom assuming 306 days of per diem payable use per year on both home and foreign lines.

TABLE 5

	Bracket	Rate	Per Diem Revenue [89]	Revenue Less Repairs
(1)	Under $1,000	$2.16	$ 660.96	$ 270.96
(2)	$1,000-5,000	2.79	853.74	463.74
(3)	5,001-10,000	3.58	1,095.48	705.48
(4)	10,001-15,000	4.50	1,377.00	987.00
(5)	15,001-20,000	6.15	1,881.90	1,491.90
(6)	20,000.01-25,000	7.11	2,175.66	1,785.66
(7)	25,000.01-30,000	9.00	2,754.00	2,364.00
(8)	30,000.01-35,000	10.18	3,115.08	2,725.08
(9)	35,000.01 and over	12.18	3,727.08	3,337.08

[89] Denoting the actual per diem revenue from users plus the amounts which would have accrued had the owner charged itself in the same fashion for its use of the car, based upon 306 per diem payable days.

By deducting the average annual cost of repairs and maintenance there is indicated the approximate amount available to meet the balance of the ownership burden consisting of the taxes and investment costs. Table 6 which follows, sets forth for cars of various costs, the years spent in each of the brackets, the indicated per diem revenue less repair and maintenance, and the approximate comparable ownership burden.[90] This table indicates that, over a 30 year depreciation period, the present multi-level method greatly overcompensates for cars of less than $6,000 value, and fails to compensate for cars of greater value.

Table 7 shows the total revenues from the present rates and the indicated owner's burden on a year to year basis, for cars of $6,000, $10,000, $20,000 and $30,000 value and portrays in more detail the failure of the present rates to compensate the owner of more expensive cars for its capital outlay.

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[90] From Tables 3 and 4.

TABLE 6

	$2,000	$4,000	$6,000	$10,000	$14,000	$20,000	$24,000	$30,000	$34,000
BR-9—Years Rev.									
BR-8—Years Rev.									4 10,900.32
BR-7—Years Rev.								6 14,184.00	5 11,820.00
BR-6—Years Rev.							6 10,713.96	6 10,713.96	5 8,928.30
BR-5—Years Rev.						9 13,427.10	7 10,443.30	5 7,459.50	5 7,459.50
BR-4—Years Rev.					10 9,870.00	8 7,896.00	7 6,909.00	6 5,922.00	5 4,935.00
BR-3—Years Rev.			6 4,232.88	17 11,993.16	12 8,465.76	8 5,643.84	7 4,938.36	4 2,821.92	5 3,527.40
BR-2—Years Rev.	17 7,883.58	25 11,593.50	22 10,202.28	13 6,028.62	8 3,709.92	5 2,318.70	3 1,391.22	3 1,391.22	1 463.74
BR-1—Years Rev.	13 3,522.48	5 1,354.80	2 541.92						
30 Yr. Total Rev.	11,406.06	12,948.30	14,977.08	18,021.78	22,045.68	29,285.64	34,395.84	42,492.60	48,034.26
30 Yr. Burden(a)	5,411.68	10,823.36	16,235.04	27,058.40	37,881.76	54,116.80	64,940.16	81,175.20	91,998.56
30 Yr. Burden(b)	3,976.12	7,952.24	11,928.36	19,880.60	27,832.84	39,761.20	47,713.44	59,641.80	67,594.04

(a)—Table 3, Col. 7 total multiplied by thousands of dollars.
(b)—Table 4, Col. 9 total multiplied by thousands of dollars.

TABLE 7

Cost	(6,000)		(10,000)		(20,000)		(30,000)	
Age	Revenue	Burden	Revenue	Burden	Revenue	Burden	Revenue	Burden
1	1,095.48	1,029.84	1,095.48	1,456.40	1,881.90	2,522.80	2,754.00	3,589.20
2	1,095.48	1,023.00	1,095.48	1,445.00	1,881.90	2,500.00	2,754.00	3,555.00
3	1,095.48	1,016.22	1,095.48	1,433.70	1,881.90	2,477.40	2,754.00	3,520.10
4	1,095.48	1,009.38	1,095.48	1,422.30	1,881.90	2,454.60	2,754.00	3,486.90
5	1,095.48	1,002.60	1,095.48	1,411.00	1,881.90	2,432.00	2,754.00	3,453.00
6	1,095.48	995.82	1,095.48	1,399.70	1,881.90	2,409.40	2,754.00	3,419.10
7	853.74	987.98	1,095.48	1,388.30	1,881.90	2,386.60	2,175.66	3,384.90
8	853.74	982.20	1,095.48	1,377.00	1,881.90	2,364.00	2,175.66	3,351.00
9	853.74	975.36	1,095.48	1,365.60	1,881.90	2,341.20	2,175.66	3,316.80
10	853.74	968.58	1,095.48	1,354.30	1,377.00	2,318.60	2,175.66	3,282.90
11	853.74	961.74	1,095.48	1,342.90	1,377.00	2,295.80	2,175.66	3,248.70
12	853.74	954.96	1,095.48	1,331.60	1,377.00	2,273.20	2,175.66	3,214.80
13	853.74	948.18	1,095.48	1,320.30	1,377.00	2,250.60	1,881.90	3,180.90
14	853.74	941.34	1,095.48	1,308.90	1,377.00	2,227.80	1,881.90	3,146.70
15	853.74	934.56	1,095.48	1,297.60	1,377.00	2,205.20	1,881.90	3,112.80
16	853.74	927.84	1,095.48	1,286.40	1,377.00	2,182.80	1,881.90	3,079.20
17	853.74	921.00	1,095.48	1,275.00	1,377.00	2,160.00	1,881.90	3,045.00
18	853.74	914.22	853.74	1,263.70	1,095.48	2,137.40	1,377.00	3,011.10
19	853.74	907.44	853.74	1,252.40	1,095.48	2,114.80	1,377.00	2,977.20
20	853.74	930.60	853.74	1,241.00	1,095.48	2,092.00	1,377.00	2,943.00
21	853.74	893.82	853.74	1,229.70	1,095.48	2,069.40	1,377.00	2,909.10
22	853.74	886.98	853.74	1,218.30	1,095.48	2,046.60	1,377.00	2,874.90
23	853.74	880.14	853.74	1,206.90	1,095.48	2,023.80	1,377.00	2,840.70
24	853.74	873.36	853.74	1,195.60	1,095.48	2,000.20	1,095.48	2,806.80
25	853.74	866.52	853.74	1,184.20	1,095.48	1,978.40	1,095.48	2,772.60
26	853.74	859.68	853.74	1,172.80	853.74	1,955.60	1,095.48	2,738.40
27	853.74	852.90	853.74	1,161.50	853.74	1,933.00	1,095.48	2,704.50
28	853.74	846.06	853.74	1,150.10	853.74	1,910.20	853.74	2,670.30
29	660.96	839.28	853.74	1,138.80	853.74	1,887.60	853.74	2,636.40
30	660.96	832.44	853.74	1,127.40	853.74	1,864.80	853.74	2,602.20

Revenue at rate applicable to particular bracket times 306 per diem payable days.

Burden comprised of annual cost for each year taken from Column 7 of Table 3 times thousands of dollars of cost, plus repairs at $390.00. Similar differences result if comparison is made using Table 4.

While the two previous tables assume that the annual average of per diem payable days for active cars will be 306, and that the annual average of repair and maintenance costs will be $390.00, similar results are produced by use of other figures. Use of a higher number of per diem payable days would increase the indicated revenue, narrowing the deficiency on higher cost cars, but enlarging the excess of reimbursement on the older cars.[91] Reduced costs of repairs would have a similar effect. Rate increases in the future would be largely the product of higher repair and maintenance costs, or changes in the car day divisor, offering no improvement in the return of capital invested. Increases required by higher depreciation and interest allowances would not relieve the problem.

The extent to which the AAR rates fail to meet the ownership burden in the 30-year period can also be tested by comparing the original cost of the car with the present worth, at time of purchase, of the indicated total car rental revenue in that period. Using standard 6½ percent discount factors [92] introduced in evidence by Southern Railway and annual revenues less repair costs shown in Table 6, the present worth of receipts for cars of $6,000, $10,000, $20,000, and $34,000 are shown in Table 8. While receipts for the $6,000 car appear reasonably related to the original cost, those for the higher cost cars fail by continually increasing margins to match the cost.[93]

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[91] Thus, using the approximate figure of 335 active car days employed by the AAR, the annual revenue from each bracket would be: (1) 723.60, (2) 934.65, (3) 1,199.30, (4) 1,507.50 (5) 2,060.25, (6) 2,381.85, (7) 3,015.00, (8) 3,410.30, (9) 4,080.30.

[92] This percentage is slightly less than the 6.62 percent used by the Cost Section in order to produce a return after taxes of 4 percent on 1960 figures. It is used here for convenience and is conservative in its showing, since the present worth would be lower if based upon the higher percentage.

[93] It appears impracticable to attempt an estimate for carriers as a whole, as to the extent these figures would be affected by consideration of investment tax credits or possible income tax savings, as suggested by some respondents. Their impact appears too conjectural to support necessary findings.

TABLE 8

$6,000		$10,000		$20,000		$34,000	
Revenue	Discount Value	Revenue	Discount Value	Revenue	Discount Value	Revenue	Discount Value
705.48	662.42	705.48	662.42	1,491.90	1,400.85	2,725.08	2,558.76
705.48	621.99	705.48	621.99	1,491.90	1,315.35	2,725.08	2,402.59
705.48	584.03	705.48	584.03	1,491.90	1,235.07	2,725.08	2,255.95
705.48	548.39	705.48	548.39	1,491.90	1,159.69	2,725.08	2,118.27
705.48	514.92	705.48	514.92	1,491.90	1,088.91	2,364.00	1,725.44
705.48	483.49	705.48	483.49	1,491.90	1,022.45	2,364.00	1,620.13
463.74	298.42	705.48	453.98	1,491.90	960.05	2,364.00	1,521.25
463.74	280.21	705.48	426.27	1,491.90	901.45	2,364.00	1,428.40
463.74	263.10	705.48	400.26	1,491.90	846.43	2,364.00	1,341.22
463.74	247.05	705.48	375.83	987.00	525.80	1,785.66	951.27
463.74	231.97	705.48	352.89	987.00	493.71	1,785.66	893.21
463.74	217.81	705.48	331.35	987.00	463.58	1,785.66	838.69
463.74	204.52	705.48	311.13	987.00	435.28	1,785.66	787.51
463.74	192.03	705.48	292.14	987.00	408.72	1,785.66	739.44
463.74	180.31	705.48	274.31	987.00	303.77	1,491.90	580.09
463.74	169.31	705.48	257.57	987.00	360.35	1,491.90	544.69
463.74	158.98	705.48	241.85	987.00	338.36	1,491.90	511.44
463.74	149.27	463.74	149.27	705.48	227.09	1,491.90	480.23
463.74	140.16	463.74	140.16	705.48	213.23	1,491.90	450.92
463.74	131.61	463.74	131.61	705.48	200.21	987.00	280.11
463.74	123.58	463.74	123.58	705.48	187.99	987.00	263.01
463.74	116.03	463.74	116.03	705.48	176.52	987.00	246.96
463.74	108.95	463.74	108.95	705.48	165.75	987.00	231.89
463.74	102.30	463.74	102.30	705.48	155.63	987.00	217.73
463.74	96.06	463.74	96.06	705.48	146.13	705.48	146.13
463.74	90.20	463.74	90.20	463.74	90.20	705.48	137.21
463.74	84.69	463.74	84.69	463.74	84.69	705.48	128.84
463.74	79.52	463.74	79.52	463.74	79.52	705.48	120.98
270.96	43.63	463.74	74.67	463.74	74.67	705.48	113.59
270.96	40.97	463.74	70.11	463.74	70.11	463.74	70.11
Total	7,165.92	Total	8,499.97	Total	15,211.56	Total	25,706.06

Reference to Table 6 also discloses substantial variations in the percentage relationships of car rental revenue, minus repairs, to the original capital cost to be recovered, as between cars of different values.

TABLE 9

Orig. Cost	30 Year Revenue	Percent Recovery Orig. Cost
$2,000	$11,406.06	570%
4,000	12,948.30	320%
6,000	14,977.08	250%
10,000	18,021.78	180%
14,000	22,045.68	157%
20,000	29,285.64	146%
24,000	34,395.84	144%
30,000	42,492.60	141%
34,000	48,034.26	141%

These figures suggest that an investment in four $6,000 cars will produce some $26,000 more as contribution to capital costs than an investment of the same amount in one $24,000 car, and the investment of the same amount in six $4,000 cars will produce nearly $44,000 more. The difference between cars over and under $6,000 in cost is marked.

The indicated excess of compensation received by owners of cars valued in the first two brackets of the multi-level rates is the product of assignment of excessive costs to those brackets. The cars are placed in groups according to their original cost plus additions and betterments, depreciated. Within the group, however, they are assigned a value based upon reproduction costs, and the weighted average of such figures employed as the base for the construction of the allowance for depreciation and return on investment. As of January 1, 1962, of some 1,606,475 cars in per diem service, 324,729, or 20.21 per-

cent were over 30 years of age and had, therefore, been fully depreciated. Owners of these cars must be presumed to have recovered their capital investment. At that time, of a group of 974,386 cars studied in connection with the present system of rates, 380,851, or 39.1 percent had average original cost plus additions and betterments depreciated of less than $1,000, while an additional 150,160, or 15.6 percent had an average depreciated cost between $1,000 and $2,000. It may reasonably be inferred that the cars in the group over 30 years of age are included in the two last mentioned value groups. Although these cars had been written down to salvage value, those in the first group received an average depreciated reproduction value of $1,299 and those in the second a value of $3,513, upon which capital charges were computed. Owners receive on such cars, not only a return of capital and interest which has already been recovered, but, in addition, this second return and interest is computed upon an inflated base. Thus, for example, a car built in 1914 at a cost of $873, fully depreciated in 1944, having a salvage value of $87, is treated as having a depreciated value of $545 and an original value of $5,448. Interest at 6 percent on the former, and allowance for depreciation at 3 percent of the latter results in claiming $196 as the annual ownership cost of capital for the car. While some justification may be found for including a normalized depreciation allowance on such cars, based upon original cost, when a single rate applicable to all cars is calculated, none is present where rates are specifically separated according to car values. The resulting compensation is excessive and clearly unreasonable.

During the course of the hearings, and at the request of various parties, the Cost Section conducted a further analysis of its studies, to the extent possible, to develop costs separated between cars of varying values. The value brackets employed were those already chosen by the AAR for construction of the multi-level rates, in order

to afford a basis for comparison.[9] Reports of car valuations, received on Form 6 were analyzed and adjusted to reflect changes through December 31, 1960. Treating each valuation group separately, distributions were made between value brackets, and determination made of original cost, depreciated original cost, reproduction value and depreciated reproduction value for the average car in each bracket. Straight line depreciation at a rate of 3 percent was used, and interest at 6.62 percent before taxes applied to the depreciated investment. Tables were prepared showing the costs, by value brackets, calculated by the T-1, MT-1, MT-2, and MT-3 methods, heretofore described. Since the 1960 studies had not attempted to separate costs by value of car, all costs other than depreciation and interest were treated as invariable. The car day divisor was also treated as constant. Active car days were distributed among the value brackets on the basis of the percentage distribution of the cars owned, and used as divisors to obtain the cost per active car day. These costs were then divided by the ratio of total foreign cars to active foreign cars, to produce the unit cost for each bracket. The Summary T-1 results, are shown below, together with the AAR multi-level rates for the same brackets.

Bracket	T-1 Orig. Cost	T-1 Repro. Val.	AAR Multi-level
0-1,000	186.681	268.913	216
1,001-5,000	245.049	329.028	279
5,001-10,000	372.455	411.277	358
10,001-15,000	500.235	512.045	450
15,001-20,000	660.481	658.792	615
Over 20,000	831.382	841.716	774

[9] In using these brackets for convenience, the Cost Section expressly disavowed any suggestion that they were the only ones that could or should be used.

While the number of differences in the underlying calculations prohibits precise comparison between the AAR rates and the T-1 value bracket costs,[*] it is significant that the latter, even on an original cost basis, indicate that the multi-level rates are not compensatory with respect to cars over $5,000 in value. At the same time, the substantially higher rates indicated by the T-1 costs, both on the original cost and reproduction value base, applied over a 30-year period, indicate a total return, less repairs, which, when discounted at 6½ percent, is substantially less than costs for the higher cost cars. If these Summary T-1 costs are substituted for the AAR rates for comparison in Table 6, similar results are produced. Thus, the 30 year revenue on a $14,000 car would be $23,294.16, compared with a minimum indicated burden of $27,832.84.

The inadequacy of overall compensation to the owner for cars in the higher brackets appears to stem primarily from the erratic progression from rate to rate produced by using the depreciated cost of the car as the guide. The span between rates in the different brackets is substantial, and there appears no correlation between the speed of movement between brackets and the speed of changes in the ownership burden. The discrepancy is the product of the long range pattern of changes in and between value brackets, rather than of the rate level at any given time.[**] It cannot be found that the progression of freight

[*] The AAR used a 6 percent interest, while the Cost Section used 6½ percent. Differences also exist in the car day divisor used and in the amount employed as the depreciated value and charge to depreciation. For example, the Cost Section calculated the depreciated reproduction value of cars in the first bracket averaged $2,073, while the AAR estimate was $1,289. The AAR calculated an average annual cost per car in each bracket and divided by a single divisor. The Cost Section calculated a total cost for all cars in each bracket, then divided each by that proportion of total active car days in 1960 that the number of cars in the bracket have to total owned per diem cars.

[**] It may be noted, however, that the present rates for the higher brackets are also of doubtful adequacy.

cars through the multi-level value brackets, and the returns obtained while in each bracket, bear any relation to the progression of the ownership burden in those periods or any consistent relation to the actual amount of that burden. Where the function is to compensate the owner for its actual burden, the use of the depreciating value of the car as a clock to measure periodic changes in rates is unreliable and is found to be unreasonable.[97]

A—*Value Brackets.*

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the multi-level rates are challenged as unreasonable both because of their size, and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

[97] Instructions issued by the AAR provide that "All cars installed in a calendar year will be depreciated the following January 1st regardless of the month installed, and each succeeding January 1st at the rate of three percent per annum. No car, regardless of age, shall depreciate more than ninety percent as ten percent of the value shall always be retained to represent salvage value." Thus use of January 1st as the anniversary date is not challenged and appears the most practicable method, whether depreciation or age is under consideration.

TABLE 10

Value Group	No. of Cars	Distribution
1		
$1,000 and less	380,851	100%
2		
$1,001-2,000	150,160	36.94%
2,001-3,000	112,112	27.58%
3,001-4,000	77,776	19.14%
4,001-5,000	66,406	16.34%
		100.00%
3		
$5,001-6,000	39,031	24.58%
6,001-7,000	36,459	22.96%
7,001-8,000	40,461	25.50%
8,001-9,000	26,818	16.89%
9,001-10,000	15,992	10.07%
		100.00%
4		
$10,001-11,000	11,155	43.24%
11,001-12,000	6,930	26.87%
12,001-13,000	4,999	19.38%
13,001-14,000	1,939	7.52%
14,001-15,000	770	2.99%
		100.00%
5		
$15,001-20,000	1,280	No Analysis
6		
Over 20,000	1,247	No Analysis

It is pointed out that, with brackets of this width, cars having actual values placing them at the upper end of the bracket do not receive compensation for their true costs. An example is a TOFC car valued at $13,253, assigned to Bracket No. 4 when installed in per diem service, which would recover in that year as interest, using 6.62 percent, some $768.00, compared with $877.00 based on its actual cost. The rates applicable to Brackets 1, 5, and 6,[98] were based on the average ownership costs, using the reproduction value basis. In Brackets 2, 3, and 4, however, the cars were arranged in sub-groups of $1,000 each, as shown above, and the weighted average used. Thus, in Bracket No. 4, the arithmetical average of the five sub-groups is approximately 474.22 cents per active car day, while the rate of 450 cents results from the preponderance of cars in the lower portion of the group. The rate reflects the cost, as computed by the AAR, for a car of slightly under $11,000 in value. Of some 25,793 cars in this group, over 7,700, or nearly 30 percent, have values exceeding $12,000 and would not be compensated by rates measured by the costs of an $11,000 car. Using as a basis the same AAR calculations which underlie the multi-level rates, cars having values between $12,000 and $15,000, which receive $4.50 per day, incur costs between $4.70 and $5.24 per day. In Bracket No. 3, cars receiving $3.58 per day incur costs ranging from $3.38 to $4.12 per day.

The applicable rates, under the current multi-level plan, change throughout the life of the car by reference to the assumed reduction in the car's value as measured by its depreciated original cost. As heretofore noted, this method produces erratic and inconsistent moves from bracket to bracket which have no discernable relationship to the

[98] Bracket 6 as used here refers to the original publication of January 1, 1964, in which this bracket encompassed all cars over $20,000 in value.

costs then borne by the owner. Since the theory contemplates the annual reduction in the car value, however, it comprehends a period of time when its value exceeds that of the weighted average, and a subsequent period of time when its value will be below that upon which the rate is calculated. To some extent, therefore, the lack of full compensation during the period the car is valued at more than the weighted average car in the bracket is balanced by the excess of compensation during the period the car is below that value. Under this system, however, it will generally be equal only by coincidence.[20] Value brackets which are of such breadth as to apply a single rate to cars having costs of the variability indicated by the AAR calculations are productive of rental income which is unrelated to the ownership burden, and are unreasonable.

B.—*Additions and Betterments.*

When the multi-level rates became effective on January 1, 1964, there was included a method of reporting which attempted to compensate owners for the extra cost of additions and betterments. Additions and betterments made prior to the time the cars were first reported for inclusion in the Master List were coupled with the depreciated cost of the car and additives, if any, to establish the value bracket in which it was to be placed. Subsequent additions and betterments were to be reported on change reports and added to the original valuation, with the anticipated result of either moving the car to a higher bracket or retaining it for a longer time in its then pres-

[20] Taking the $13,253 car mentioned above as an example, this car would depreciate $397.60 per year, allowing 10 percent for salvage. For the first six years its value would exceed $11,000. In the seventh year it would approximate the weighted average, and in the eighth and ninth it would be below. In the tenth year it would drop to the next lower bracket, having received six years of varying undercompensation in exchange for two years of varying overcompensation.

ent bracket. Analysis of the effect of the latter procedure reveals, however, that the resulting increases in revenue bear no reasonable relation to the cost of the additions and betterments.

Table 11, below, shows the total additional revenue which would be derived as a result of an addition or betterment of $500 in each year of the life of eight different cars having original costs ranging from $2,000 to $30,000. Additions or betterments of different amounts would, of course, produce different total results, but it is apparent from the comparisons made in this table, that there is no reasonable relationship between the results produced by the expenditure of the same amount of money on different cars, all of the same age or between the expenditure and the actual recovery in most cases. Thus, an addition costing $500 to a $4,000 car in the 14th year of its life will produce for the owner additional revenue of $192.78. The same amount expended on a $14,000 car in its 14th year produces no additional revenue. An expenditure of the same amount on a $6,000 car in the eighth year of its life results in additional car rental revenue of $192.78 while the same amount expended on a $30,000 car in its eighth year produces no additional revenue. If the A&B is accomplished in the fifth year, the $2,000 and $30,000 cars derive additional revenue of $578.34, the $4,000 car receives $192.78 and the $6,000 car will receive $676.24. The latter will receive $192.78 if the A&B is made in the 26th year but the other cars will receive no return at all for an A & B in that year.

TABLE 11

RETURN PRODUCED BY A&B OF $500 EFFECTED IN VARIOUS YEARS OF LIFE OF CAR

Year A & B Effected	2,000	4,000	6,000	10,000	14,000	20,000 [1]	24,000	30,000
				Indicated Return				
1	578.34	192.78	676.24	523.26	281.53	523.26	293.76	578.34
2	578.34	192.78	676.24	241.76	281.53	523.26	293.76	578.34
3	578.34	192.78	676.24	241.76	281.53	523.26	293.76	578.34
4	578.34	192.78	676.24	241.76	281.53	523.26	293.76	578.34
5	578.34	192.78	676.24	241.76	281.53	523.26	293.76	578.34
6	578.34	192.78	676.24	241.76	281.53	523.26	293.76	578.34
7	578.34	192.78	534.51	241.76	281.53	523.26	0	0
8	578.34	192.78	192.78	241.76	281.53	523.26	0	0
9	578.34	192.78	192.78	241.76	281.53	523.26	0	0
10	578.34	192.78	192.78	241.76	281.53	523.26	0	0
11	578.34	192.78	192.78	241.76	0	523.26	0	0
12	578.34	192.78	192.78	241.76	0	523.26	0	0
13	578.34	192.78	192.78	241.76	0	523.26	0	0
14	578.34	192.78	192.78	241.76	0	523.26	0	0
15	578.34	192.78	192.78	241.76	0	523.26	0	0
16	578.34	192.78	192.78	241.76	0	523.26	0	0
17	578.34	192.78	192.78	241.76	0	523.26	0	0
18	385.56	192.78	192.78	0	0	241.53	0	0
19	192.78	192.78	192.78	0	0	241.53	0	0
20	0	192.78	192.78	0	0	241.53	0	0
21	0	192.78	192.78	0	0	241.53	0	0
22	0	192.78	192.78	0	0	241.53	0	0
23	0	192.78	192.78	0	0	241.53	0	0
24	0	192.78	192.78	0	0	241.53	0	0
25	0	192.78	192.78	0	0	241.53	0	0
26	0	0	192.78	0	0	0	0	0
27	0	0	192.78	0	0	0	0	0
28	0	0	192.78	0	0	0	0	0
29	0	0	0	0	0	0	0	0
30	0	0	0	0	0	0	0	0

1—Using the $20,000 car as an example, this car, without additions and betterments would spend 9 years in Bracket 5, 8 years in Bracket 4, 8 years in Bracket 3, and 5 years in Bracket 2. An addition or betterment of $500 made in or before the 17th year would keep the car in Bracket 4 one additional year and remove it from Bracket 2 for one year, the net additional revenue being $523.26. If made between the 17th and 25th year, the car would remain one extra year in Bracket 3, and one less year in Bracket 2, for a net revenue increase of $241.53. If made after the 25th year, no revenue change would result.

During the final session of hearings a witness from the AAR testified that, in his opinion, a large part of the reductions in number of cars in value groups 1 and 2 between January 1, and September 1, 1964, was due to retirements of older cars. Access was afforded to the supporting papers and subsequently a witness for Southern Railway testified that the sample data combined in one group both cars retired and cars renumbered. Ruling on motions to strike the testimony of both witnesses was deferred to permit the parties to argue their positions on brief, with the understanding that both motions would be treated alike. Since no party undertook to brief this issue, both motions are denied.

VI—Alternate Proposals

An economic expert, testifying on behalf of the 20 road group, advocated the calculation of per diem rates by reference to "economic cost", rather than by reference to the actual costs of owning and operating the cars. In substance, the proposal was to measure the per diem revenue to owners by the return which the owner could obtain from alternative investments. The foregoing of the alternative return was said to constitute a lost opportunity cost of capital to the owner, since it represented earnings that could have been obtained had the money been put to some use other than being tied up in freight cars. It was the view of this witness that "what is pertinent for the per diem rate decision is the added investment in added freight cars and the added profits, cash flow earnings that you have if you made the investment as opposed to not making it". The theory requires an attempt to set the per diem rate at the level it would reach if there were a free and open market for the leasing of freight cars and so as to induce railroads to invest in more freight cars.

The method thus espoused is that of the investment advisor and is not, in the opinion of the Examiner, appropriate for application to the problem here presented. It

assumes that cars are built to earn per diem income, and that the demand for freight cars is influenced by the market competition of other railroads for foreign cars rather than by the requirements of shippers. Inherent in this approach is the payment by users of appreciable amounts of profit and the imposition of a burden which is not the cost of acquiring and maintaining the car used, but that of compensating the owner for income it might have received in a more profitable venture.[106] The proponents of this theory offered no evidence upon which any calculations might be based or per diem rates computed using the suggested method. There is, therefore, no way to measure the product.

During the 1954 hearings a plan was suggested by the Boston and Maine R. R. which involved the assignment of a different rate to each owner. The Long Island R. R., in 1954, suggested a method which, like Summary MT 2, in

[106] Underlying this theory is a concept of the function of car rental charges which goes beyond the statutory provision for compensation. It assumes that the charges should be so devised as to assure the nation of a freight car fleet of adequate total size and reliability, to motivate management to buy various types of cars as needed, to induce railroads to own cars to the extent that the national interest is served by their possession of such cars, to provide an incentive to fast turn-around of cars, and to compensate owners for "true economic costs" of ownership without imposing any unreasonable burden on users. See Exh. R 295, Page 5. It was the view of this witness that the adequacy of the supply of cars was an underlying question in this case and that "the idea of per diem is to induce private corporations voluntarily to tie up their capital in freight cars". These are all regulatory functions. They require the payment of profit by users; as might be expected, since there is little incentive to investment in the prospect of merely breaking even. The theory assumes the highly questionable proposition that net per diem creditors will voluntarily purchase the number and size of cars needed by the nation, without regard to their particular needs. It assumes value of use, rather than cost as a measure. If users are required to pay owners an element of profit on the value of the car for their proportionate part of its use, they are required to contribute greater amounts toward meeting the cost of the car than the owners.

volved the assignment of a different rate to each user. Neither was presented in sufficient detail or with such cost based analysis as to make possible any constructive evaluation, nor were they urged at the current stage of the case.

Southern Railway urges that the cost analysis be based on original costs, depreciating cars over a 14-year period using a double declining balance method of depreciation, and allowing interest on investment at 8 percent before taxes. Under this plan, rate changes would be related to the age of the car, rather than to its depreciated value. As proposed, the rate would change every four years for the first twelve, and after 14 years would drop to a permanent level applicable during the remainder of its use in per diem service. Rates vary between value groupings, based on original cost, which cover a range of $2,000, except the first which is from zero to $1,000. No provision is made for the cost of additions and betterments. A scale of rates constructed by Southern Railway and incorporating these factors, is shown in Table 12, below.

The Southern Railway analysis separates ownership costs into those referred to as variable, consisting of depreciation, interest, and property taxes on freight cars, and those referred to as constant, consisting of repair costs, depreciation, interest, and property taxes on repair facilities, payroll taxes, hire of freight cars,[10] and return on working capital. Amounts used for constant costs are those calculated by the Cost Section, based on the 1960 studies, except for an adjustment to reflect Southern's criticism of the cost of switching bad order cars. The total, divided by the active per diem car days for 1960, produces a daily "constant" cost of $1.44. Variable costs are measured by a table similar to Table 2, supra, which calculates depreciation, interest, and property taxes on the cars per $1,000 of original cost, but using the 14 year,

[10] Inclusion of 10.344 cents per active car day for this item appears to duplicate amounts included in the separately calculated charges for depreciation and interest on cars.

years. Reference to the Annual Reports on Transport Statistics in the United States, of which official notice is taken to the extent mentioned below, indicates that the cash payment on purchases of equipment varies widely.[107] In many instances there is no cash payment, while in others the payment exceeds 45 percent. In 1962 there were 13 instances where no cash payment was made, 10 instances of payments between 19 and 21 percent, and 5 in excess of 23 percent. The average for all districts was about 10 percent, but exceeded 27 percent in the Southern Region. Two carriers paid as much as 37 percent and 46 percent cash, respectively. Upon all the evidence, the Examiner finds that compensation to owners of cars requires that allowance for changes in the purchasing power of invested funds should be made with respect to 40 percent of the original cost of cars.[108] The remaining 60 percent should be treated as funds subject to repayment over the life of the car, in dollars of then current purchasing power, as to which the car owner suffers no loss of value.

The Cost Section studies developed that the average equipment obligations outstanding in the year 1960, assignable to ownership costs, totalled $1,537,312,286, on which had accrued a total of $59,164,994 in interest, indicating an average rate of 3.849 percent. The Examiner finds that compensation to owners for the interest element of the burden is accomplished by allowance of 6.62 percent interest before taxes on the unrecovered balance of 40 percent of the original cost of the car, and interest at 4.0 percent on the unrecovered balance of the remain-

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[107] Seventy-Sixth Annual Report on Transport Statistics in the United States for the year ended December 31, 1962, Table 146-A.

[108] This allowance includes consideration of the fact that, to the extent an owner must repay loans in 15 years, but collect per diem based upon a 30 year span, it necessarily incurs additional burden. See Appendix C.

ing 60 percent. Table 14, below, embodies these considerations and those discussed in preceding sections of this report, and indicates a method by which the investment cost per $1,000 of original cost may be calculated for application to cars of varying ages based on the cost index through 1961.

Changes in the rates applicable to a car over its operating life, accomplished by moving it from one value bracket to another on the basis of its current depreciated value have been considered above and found to be unreasonable. Changes based upon age of the car in service more nearly conform to the pattern of changes in ownership burden.[109] A system making use of the latter method places a car in a value bracket based upon its original cost, where it may remain. Since there is no progression downward through the bracket in such case, it is even more important that the value used to calculate the cost of each bracket closely approximate the cost of the cars therein. Necessarily, narrower brackets are required. The Examiner finds that brackets no more than $2,000 in width, as recommended by Southern Railway, with rates calculated upon the middle value of each, are adequate to satisfy this requirement. Table 15, following, translates the five year average annual costs from Column 12 of Table 14 into investment costs for six time brackets, and into value brackets having no more than $2,000 spreads. Rate changes experienced over the operating life of new cars will be substantially the same in number as under the present multi-level system, but will produce revenues which are related to the ownership costs. The Examiner finds that investment costs calculated in the manner set forth above will result in a fair and reasonable compensation to car owners for this element of the ownership burden.

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[109] Evidence of car leases with the Equitable Life Assurance Society between 1950 and 1962 show rates graduated with the age of the car, separated into five three year brackets and one 10 year bracket.

TABLE 14

1	2	3	4	5	6	7	8	9	10	11	12
Year in per diem service	Year Installed in Service	Return Subject To Index	Index[1]	Adjustment factor[2]	Adjusted Return[3]	Balance of Return	Interest on Col. 3 Balance[4]	Interest on Col. 7 Balance[5]	Property Taxes[6]	Total	Five Year Average
1	1961	10.00	624	1.000	10.00	20.00	26.15	23.60	11.43	91.18	
2	1960	10.00	619	1.008	10.08	20.00	25.49	22.80	11.08	89.45	
3	1959	10.00	612	1.019	10.19	20.00	24.83	22.00	10.73	88.75	88.13
4	1958	10.00	594	1.050	10.50	20.00	24.16	21.20	10.38	86.24	
5	1957	10.00	562	1.110	11.10	20.00	23.50	20.40	10.03	85.03	
6	1956	10.00	516	1.209	12.09	20.00	22.84	19.60	9.69	84.22	
7	1955	10.00	468	1.333	13.33	20.00	22.17	18.80	9.34	83.64	
8	1954	10.00	450	1.386	13.86	20.00	21.51	18.00	8.99	82.36	82.22
9	1953	10.00	443	1.431	14.31	20.00	20.85	17.20	8.64	81.00	
10	1952	10.00	415	1.503	15.03	20.00	20.18	16.40	8.29	79.90	
11	1951	10.00	401	1.556	15.56	20.00	19.52	15.60	7.94	78.62	
12	1950	10.00	371	1.682	16.82	20.00	18.86	14.80	7.59	78.07	
13	1949	10.00	360	1.733	17.33	20.00	18.19	14.00	7.25	76.77	76.92
14	1948	10.00	343	1.819	18.19	20.00	17.53	13.20	6.90	75.82	
15	1947	10.00	320	1.950	19.50	20.00	16.88	12.40	6.56	75.34	
16	1946	10.00	300	2.080	20.80	20.00	16.22	11.60	6.22	74.84	
17	1945	10.00	254	2.457	24.57	20.00	15.56	10.80	5.87	76.80	
18	1944	10.00	254	2.457	24.57	20.00	14.90	10.00	5.52	74.99	74.44
19	1943	10.00	254	2.457	24.57	20.00	14.24	9.20	5.18	73.19	
20	1942	10.00	244	2.557	25.57	20.00	13.57	8.40	4.83	72.37	
21	1941	10.00	222	2.810	28.10	20.00	12.91	7.60	4.48	73.09	
22	1940	10.00	213	2.929	29.29	20.00	12.25	6.80	4.13	72.47	
23	1939	10.00	202	3.089	30.89	20.00	11.58	6.00	3.78	72.25	71.88
24	1938	10.00	194	3.216	32.16	20.00	10.92	5.20	3.43	71.71	
25	1937	10.00	194	3.216	32.16	20.00	10.26	4.40	3.08	69.90	
26	1936	10.00	182	3.428	34.28	20.00	9.59	3.60	2.73	70.20	
27	1935	10.00	177	3.525	35.25	20.00	8.93	2.80	2.38	69.36	
28	1934	10.00	165	3.781	37.81	20.00	8.27	2.00	2.03	70.11	71.10
29	1933	10.00	144	4.333	43.33	20.00	7.61	1.20	1.68	73.82	
30	1932	10.00	144	4.333	43.33	20.00	6.95	0.40	1.33	72.01	
Over 30							6.62	0.00	1.16	7.78	

[1] Indices of Account No. 53, appearing in Schedule of Annual Indices for Carriers by Railroad, published by the Bureau of Accounts, Interstate Commerce Commission.

[2] Index figure (Col. 4) for 1961, divided by index for particular year.

[3] Col. 3 multiplied by Col. 5.

[4] Rate of 6.62 percent applied to mid-year balance based on $400.00.

[5] Rate of 4.0 percent applied to mid-year balance based on $600.00.

[6] Computed at 0.01163 times mid-year value based on $1,000.00, and assuming annual reduction in value at 3 percent after exclusion of 10 percent salvage value. Property taxes are assessed by the different states and municipalities on various bases, not all of which employ the value of the car. The Cost Section and the AAR analyses spread the total cost of such taxes over all cars evenly, while the Southern Railway method assigned them according to the depreciated cost of the car. The latter method has been employed in these tables. Allocation of total property taxes in the Cost Section 1960 study was made between car ownership costs and other expenses on the basis of undepreciated investment on an original cost basis. Similar distribution between cars of differing costs appears to be consistent with this approach and to embody the customary consideration in assessing such taxes.

NOTE: Columns 5 and 6 would require annual recomputation. Necessarily, the index for the current year must be estimated. Recent history of the index demonstrates that application of mathematical average movement would not produce reasonable results and that forecasting will be more reliable if an informed judgment is applied to the trend of the index to take into consideration existing and anticipated economic conditions.

TABLE 15

ANNUAL CAPITAL COSTS

Years in Service:	Original Cost of Car: 0 to 1,000	1,000 to 3,000	3,000 to 5,000	5,000 to 7,000	7,000 to 9,000	9,000 to 11,000	11,000 to 13,000	13,000 to 15,000	15,000 to 17,000	17,000 to 19,000
1-5	88.13	176.26	352.52	528.78	705.04	881.30	1,057.56	1,233.82	1,410.08	1,586.34
6-10	82.22	164.44	328.88	493.32	657.76	822.20	986.64	1,151.08	1,315.52	1,479.96
11-15	76.92	153.84	307.68	461.52	615.36	769.20	923.04	1,076.88	1,230.72	1,384.56
16-20	74.44	148.88	297.76	446.64	595.52	744.40	893.28	1,042.16	1,191.04	1,339.92
21-25	71.88	143.76	287.52	431.28	575.04	718.80	862.56			
26-30	71.10	142.20	284.40	426.60	568.80	711.00				
Over 30	7.718	15.56	31.12	46.68	62.24					

Years in Service:	Original Cost of Car: 19,000 to 21,000	21,000 to 23,000	23,000 to 25,000	25,000 to 27,000	27,000 to 29,000	29,000 to 31,000	31,000 to 33,000	33,000 to 35,000	35,000 to 37,000	37,000 to 39,000	39,000 to 41,000
1-5	1,762.60	1,938.86	2,115.12	2,291.38	2,467.64	2,643.90	2,820.16	2,996.42	3,172.68	3,348.94	3,525.20
6-10	1,644.40	1,808.84	1,973.28	2,137.72	2,302.16	2,466.60	2,631.04	2,795.48	2,959.92	3,124.36	3,288.80
11-15	1,538.40	1,692.24	1,846.08	1.999.92	2,153.76						

B—*Repair and Maintenance Costs.*

In calculating the total ownership burden, there must be added to the investment costs of the car an amount representing the cost of repairs and maintenance reasonably to be expected during the ensuing year. Prior to the calculations underlying the $2.88 rate, Account 314 repair costs had been estimated by the AAR using the costs of the latest available year. Beginning with that rate, and

again in the calculations underlying the multi-level rates, the average of Account 314 costs for the last five years, adjusted to current levels, was employed. Certain respondents challenge this procedure, pointing out that in each case, the result was a higher estimate than would have been produced by use of the latest year's data alone. Since the end sought was the approximation of the repair costs reasonably to be anticipated in the future, the use of an average of such costs over a recent period cannot be held unreasonable in principle. The record indicates, however, that this method did not produce reliable approximations of the anticipated repair costs.

Account 314 amounts for repairs over the period 1954 through 1963 are shown below, and demonstrate that frequent fluctuations occur in this item, making prediction difficult.[110] Differences, in some instances, are as much as twenty percent between two consecutive years.

TABLE 16

Year	Account 314	Approx. Change
1953	$631,414,135	
1954	497,291,943	Down 21 percent
1955	546,762,340	Up 10 percent
1956	572,110,661	Up 5 percent
1957	569,287,048	Down ½ percent
1958	467,793,875	Down 19 percent
1959	516,023,831	Up 11 percent
1960	488,898,352	Down 5½ percent
1961	438,620,793	Down 10½ percent
1962	451,807,303	Up 3 percent
1963	442,765,010	Down 2 percent

[110] Figures for Account 314 for Class I line-haul railroads, used by the AAR were introduced in evidence for the years 1954 through 1961. Official notice is taken of the figures for 1953, 1962 and 1963, respectively, as reported in Transport Statistics in the United States, Part I, Table 158 (1953) and Table 166 (1962-1963).

The 1954-1958 adjusted Account 314 average as computed by the AAR and employed in calculations underlying the $2.88 rate which became effective December 1, 1959, was $590,045,295. The actual amount subsequently developed by the AAR for 1959 was $516,023,831, and for 1960, the first full year in which the rate applied, the actual amount was $488,898,352. In 1961 the figure dropped to $438,620,793. The record shows that no combination of prior years would have produced an average reasonably close to the actual costs of the following year. Use of the 1958 figure alone would have resulted in an underestimate for both years but the discrepancy would have been much less. Differences between consecutive years are as much as $100,000,000 in some instances, however, indicating that single year costs do not necessarily furnish a reliable measure for following years. Since purely statistical solutions appear to be misleading, some measure of experienced judgment must be applied to the historical costs. The Examiner finds that, in determining whether rates for any following year should be revised, the repair costs to be anticipated should be estimated with reference to the costs of the latest available year, to the trend of such costs in recent years, if any, to the present and anticipated level of car demand, and to other relevant factors, rather than by strict employment of an average of such costs for a period of past years.

The calculation of repair and maintenance expenses for prior years to provide a basis for consideration is an accounting problem which may be solved in various ways, any of which might be considered reasonable provided the result was an equitable apportionment to ownership costs of all pertinent items. Disputes with respect to the calculation of some items, and the validity of certain apportionments, have heretofore been discussed. Prior to 1960, per diem ownership costs had not been made the subject of as extensive and detailed analysis as appears necessary. Future samplings and studies will undoubtedly pro-

duce greater accuracies. Employment thereof will depend largely upon whether the savings exceed the costs of the determination. Prescription by the Commission of a hard and fast method of calculation, which could be varied only after recourse to further proceedings, appears both uneconomical and inefficient. The method employed by the Cost Section in its analysis of 1960 data, however, is based upon the most recent information with respect to extent and allocation of the various items, and is embodied in summary form in a publication entitled Rail Form H, Formula for Use in Determining Per Diem Charges For The Use of Freight-Train Cars. This form, introduced in evidence as Exhibit R-5, is available to any interested person through the Bureau of Accounts of the Interstate Commerce Commission, and is summarized in Appendix B to this report. The Examiner finds that Schedules 1 and 2, and Summary T-1 through Column 3, contained in Form H, with certain deletions hereinafter mentioned, may appropriately be used to calculate the aggregate ownership costs for repair and maintenance of per diem cars.[111]

Form H is so designed as to permit the application of ratios and apportionments developed in prior years, to the data of the year under analysis. In its published form, it necessarily employs the factors developed from the special studies in 1960 and refers throughout to the 1960 base. While these factors may be used until replaced by more recent studies, the elapsed time is such as to require that such studies be made, and repeated at appro-

[111] The remaining columns of Summary T-1, and Summaries MT-2, and MT-3, have to do with the distribution of ownership costs among users, without distinction as to car values. In view of the findings in this report, they do not appear readily adaptable to a system of costs which vary by car value. While summary calculations were introduced showing costs on these bases, varying with value, no formulae were offered in the Form H style, to facilitate future calculations.

priate intervals. In this respect, the recommendations of the Commission's Cost Section deserve consideration. These include (1) Provision for separate reporting quarterly of per diem and non-per diem freight cars on line, (2) monthly counts of surplus per diem cars, separated between home and foreign cars, and (3) separating the report of line-haul car-miles of loaded and empty cars as reported in Schedule 531 of Railroad Annual Report Form A between home per diem cars, foreign per diem cars, and non-per diem cars. Particular care appears necessary to insure accuracy of the reports of surplus cars. The importance of up-to-date calculation of the car day divisor and the effect of unreliable reports on this figure have already been noted.

C—*Valuation of Cars.*

Classification of cars into nine value groups under the present multi-level rates is based upon their original cost plus additions and betterments, depreciated. The system here recommended calls for classifications into brackets based on their original cost, undepreciated.[111a] Where cars were built or rebuilt in the carriers' own shops, this base figure varies due to differences in accounting systems and the extent to which all costs associated with the construction were capitalized. Among the items sometimes omitted in first establishing the original cost were payroll taxes, vacation pay, holiday pay, health & welfare, shop and power plant repairs and maintenance, shop depreciation, etc. On May 6, 1963, the AAR issued instructions and reporting forms designed to adjust the original costs as first reported, so as to reflect the omitted items. These instructions and forms were revised by a second letter on June 25, 1963. The amounts reported in response thereto are referred to as "additives".

[111a] Also including additions and betterments to date.

Since practices varied as to the items capitalized or omitted in the original reported cost, the instructions provided that each railroad was to determine which items had not been theretofore capitalized and submit additives only with respect thereto. No additives were permitted on additions and betterments accomplished subsequent to original construction of the car. Whether any claim for increased valuation was to be made was left to the option of the car owner. All revisions were subject to review and approval by the Cooperating Committee of Accounting Officers of the AAR. Form C provided for a report on each car, showing car initial, number, AAR mechanical designation, whether owned or leased, year installed and whether new, rebuilt, or second-hand, original cost plus additions and betterments undepreciated, adjusted original cost plus additions and betterments undepreciated, and per diem group applicable. Forms D and E provided for reporting of changes in value due to additives, as described hereinafter, for cars built in owners' shops and cars rebuilt in owners' shops, respectively. Forms D-1 and E-1, were provided as supplemental to Forms D and E, to show the details of the amounts added.

Instructions issued by the Cooperating Committee of Accounting Officers accompanied the distribution of Forms C, D, D-1, E, and E-1, and provided that additive amounts for payroll taxes, vacation pay and holiday pay should be computed by reference to the total capitalized labor cost using standard percentages developed by the General Managers Association for the year the car was built or rebuilt. Additives for interest on working capital were authorized at one percent of the total capitalized labor costs; for deadhead haul the additives prescribed were 6.06 percent of the direct material cost, capitalized; and, for interest on stock of capitalized material, the authorized additive was 1.50 percent of the direct material cost as capitalized. To the extent permitted by

carrier records, the additive for personal injuries was to be computed as an average of the preceding five years. If not possible, then the current year or an average of one or more of the preceding five years was permitted. Other additives were to be based upon the carriers' records, specific shop data being used when available and system averages otherwise. At the time of the hearings in these cases, no system of auditing had been instituted by the AAR to verify the accuracy of the reported valuations or corrections, although the subject was then under consideration. The Committee of Accounting Officers had, however, adopted a procedure, in instances where a reported valuation appeared too high or too low, of comparing it with a similar car reported by another carrier and striking an average of the two.

Southern Railway contends that the use of additives to increase the original cost figure is unlawful because not authorized by vote of the members of the Per Diem Agreement. It did not, however, specify the provision of the agreement which requires such a vote, and a review of the agreement reveals none. The agreement constitutes the General Committee—Operating-Transportation Division of the AAR, and the Board of Directors of that organization, as agents of the members to consider, inter alia, the desirability of changes in the rates of per diem. The Board of Directors is to determine what proposal, if any, for such a change shall be submitted to the members for vote. The decision rests solely in the judgment of the Board as determined by a majority vote of its members. In submitting the proposal, it is to transmit to each member the pertinent report or reports received from the General Committee, including minority reports. Following approval of a change by the members of the per diem agreement, the *Association* shall cause the same to be made effective, *taking all proper steps to that end.* Article 3(a) of the Plan of Organization of the Association of American Railroads provides that general

supervision and control of the affairs of the Association is vested in the Board of Directors.

The assignment of responsibilities and delegation of authority in such board and general terms necessarily confers upon the Board of Directors considerable scope for the exercise of judgment. Apparently Southern Railway does not contend that the original cost of cars built in carrier's shops should not include all proper elements of cost. It is not asserted that the report submitted to the members failed to indicate that original cost was to be used as the base for classifying cars into rate brackets. The decision of the Board of Directors to permit carriers to submit additional items of cost properly attributable to the cars, which had not been capitalized theretofore, for inclusion as part of the original cost, does not appear to be in excess of the authority granted by the agreement.

It is also contended that the system established by the AAR to revise the original capitalized cost of cars by use of additives lacks a uniform basis, lacks consistency with rational accounting policies and practices, and fails to provide an effective audit. It is said to violate accepted cost accounting principles and to introduce such error into charges under the multi-level rates as to render them unreasonable and unlawful. Most of the evidence offered in support of these allegations, however, is speculative and relies upon variations in reported percentages which could arise from rational as well as irrational causes. The fact that car values after adjustment by the inclusion of additives are higher than appear in original Form BV-588 reports to the Commission's Section of Valuation fails to establish any error in either. Form BV-588 is subject to revision during construction to reflect changes in costs. No meaningful inconsistencies were shown to exist in the instances cited. Generally, the original costs as reported on BV-588 and Form D-1 were the same. That railroads

vary in the amount of data reported on Form BV-588 is irrelevant to the accuracy of additive calculations. While wide variations appear in the percentages of labor costs submitted as additives between different carriers, it cannot be found that they stem from other than differences in the extent to which such costs were originally capitalized.[112] Differences in additives for overhead items can vary from year to year depending on the volume of work over which they are distributed. Conjectural calculations as to what could occur, or might be occurring in connection with the reporting of additives, can be accorded no probative weight.

Certain criticisms of the method established for calculation of additives appear justified. It is not clear that the labor items and material items on Form D-1 and E-1, which were used as the percentage basis for the additives, do not already contain some overhead items which could be repeated in the calculation of items 31 to 33 on the Forms employing predetermined percentages set in the General Managers Formula. Steps should be taken to detect and avoid errors appearing in the reports arising from transposition of figures and other causes. Appropriate studies are needed to ascertain the extent to which the uncapitalized costs should not be now added, due to their inclusion as operational costs of the year in which they were accomplished.[113] While some corrections, further study, and appropriate auditing of the reports are advisable, the indicated defects cannot be found so substantial as to invalidate the entire rate structure.

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[112] Variance in construction costs of cars as between different car builders would not seem unusual, in any event.

[113] To an indeterminate extent, such costs may enter into the base for calculation of repair and maintenance employed in setting per diem rates. Similarly, as much as 50 percent of such costs may be recovered in the year charged to expenses through reduction in income taxes.

It is argument, and some witnesses expressed the view, that car values might better be determined by independent appraisal, or by using the prices of equivalent cars built by independent car builders as a guide. Proponents of this method point out that owners who purchase cars pay more than those who build equivalent cars, and, based upon the higher reported cost, derive a higher per diem payment. This, however, would not warrant valuing the railroad built cars at a figure higher than their cost, since the function of the rate is to compensate the owner for his actual outlay, not for what the outlay might have been had he acquired the car in some other fashion.

In the initial phases of changing from a per diem system which gave no consideration to the cost of specific cars, to a system based directly thereon, certain procedures based upon the practical necessities of the situation cannot be avoided. It cannot be found that the method devised by the AAR for adjusting original capitalized costs of cars to reflect the addition of cost items which should have been included is unreasonable. Without doubt, it is capable of improvement and, as heretofore noted, there is under consideration the matter of auditing these reports. The problem exists primarily with respect to cars in the present fleet, since the original costs of cars built or rebuilt in the future will presumably have their full costs capitalized when reported. Of over one and one-half million cars, additives had been reported on 269,740 as of September 2, 1964. Newly built cars represented 226,872 of this number, and rebuilt cars some 42,868. Auditing, at least on a sample basis, appears feasible and certainly desirable in the interests of all carriers, both as owners and users. No reason appears, however, why all cost factors should not be considered in classifying cars in brackets whether the depreciated original cost is employed as in the present method, or according to their undepreciated original cost as herein recommended.

D—*Additions and Betterments.*

Certain improvements made to a car during the course of its service life, generally referred to as "Additions and Betterments", are treated as capital items rather than as current repairs. They are items of ownership burden which, because they occur at various times subsequent to the installation of the car in interchange service, require separate treatment. Prior to the institution of the multi-level rates, in 1964, the per diem rates and underlying calculations did not purport to reimburse the owner specifically for such costs. Very little evidence was introduced to assist the Commission in dealing with these costs, and the record suggests that owners have not been particularly concerned with obtaining reimbursement for them. Nor are they provided for in the per diem system suggested by Southern Railway in this proceeding. Clearly, however, they are as much a part of the cost of the car as the original construction cost. Adding these costs to the original base figure as in the present multi-level system fails to produce equitable compensation. Treatment of these costs as provided hereinafter, should be considered as interim in nature. Other methods of handling them, or evidence that it would be more economical to ignore them, should be brought to the attention of the Commission.

The cost of Additions and Betterment is substantially less than the original cost of the cars, since, beyond specified limiting amounts, the work results in rebuilding the car and the establishment of a new cost basis.[114] It appears, therefore, that a simplified method should be ade-

[114] Additions and betterments to 1,057 Southern Railway cars, of varying ages from three to 37 years, as of December 31, 1959, averaged $220.00. The highest average for a single group was $367.00, although, since not all cars may have received the same attention, costs on individual cars may be higher.

quate to provide compensation. Since the improvements may be made at any time throughout the operating life of the car, the period over which the cost should be recovered will necessarily vary. Ease of administration suggests that the period should end concurrently with the end of the 30 year period for recovery of other capital costs. Thus, for example, an addition made in the seventeenth year should be recovered over the following thirteen years. Interest on this added investment should be allowed at 6.62 percent, in similar fashion to that allowed on the original investment. The impact of property taxes, however, has necessarily been calculated in a quite general manner for per diem purposes, and an attempt to apportion such costs with respect to these relatively small expenditures seems a refinement of doubtful validity. The same is true with respect to allowance for changes in cost levels and allocations of a fraction thereof to mileage.

Table 17, below, shows the total cost of principal and interest at 6.62 percent of an expenditure of $100 over periods from five to thirty years, inclusive. The last five years have not been computed on the assumption that additions and betterments are less likely to be made near the end of the service life. They can be added if necessary. This table also shows the average cost per year for each period, and the indicated average cost per diem payable day, using 306 days. For practical purposes, the cost of a given addition or betterment, taken at the nearest $50.00, multiplied by the factor for the year accomplished, should present no great problem in computerized development of per diem credits and debits. Where successive additions or betterments are made the unrecovered balance of the earlier may be added to the most recent to establish the daily cost over the remainder of the life of the car.

TABLE 17

Average Cost per $100 of Additions and Betterments to Cars at Various Ages.

Age A & B Made	Total Cost	Average Annual Cost	Average Cost (1) per diem payable day
1	$199.30	$ 6.87	2.24 cents
2	195.99	7.00	2.29 cents
3	192.68	7.14	2.33 cents
4	189.37	7.28	2.38 cents
5	186.05	7.44	2.43 cents
6	182.75	7.61	2.49 cents
7	179.44	7.80	2.55 cents
8	176.13	8.00	2.62 cents
9	172.82	8.23	2.69 cents
10	169.51	8.48	2.77 cents
11	166.20	8.75	2.86 cents
12	162.89	9.05	2.96 cents
13	159.58	9.39	3.07 cents
14	156.27	9.77	3.19 cents
15	152.95	10.19	3.33 cents
16	149.65	10.69	3.49 cents
17	146.34	11.26	3.68 cents
18	143.03	11.92	3.89 cents
19	139.72	12.70	4.15 cents
20	136.41	13.64	4.45 cents
21	133.10	14.79	4.83 cents
22	129.79	16.22	5.30 cents
23	126.48	18.07	5.91 cents
24	123.17	20.53	6.71 cents
25	119.86	23.97	7.83 cents

(1). Annual cost divided by 306 per diem payable days. Actual costs per year and per day would vary from the average in each instance to the extent required to meet cumulative interest costs of the difference between average and actual cost for the particular year, with lower payments during last half of each repayment period.

Southern Railway challenges the method of averaging the total cost of additions and betterments to a group of cars over all units therein, pointing out that not all may have received the same amount of work. It cannot be found, on the present record, that the more accurate analysis of the incidence of these costs would result in per diem revenue differences sufficient to justify the effort or render unreasonable the results produced by use of average figures.

VIII—Distribution of the Annual Burden

The second major problem presented, after ascertaining the annual burden of the owner, is the manner in which it shall be shared by users of the car.[115] In the past, charges have been computed on the basis of a daily rate, a rate per mile of operation, and a combination of both. About 1867 a number of railroads agreed to a charge of 1¼ cents per loaded mile, which was later revised to ¾ cent per mile, loaded or empty, for cars of ordinary construction.[116] A combination time-mileage plan was attempted in New England in the early 1870's and a straight

[115] No small part of the interest in this second problem on the part of certain predominately terminating lines is due to the fact that they are net per diem debtors, and incur annually a substantial liability to other lines for per diem payments. That these lines occupy a difficult position cannot be denied and their inability to employ enough of their own cars to earn offsetting per diem credits locks them in that status. If, however, the per diem rates are fairly calculated and distributed, it cannot be found that they are contributing other than their fair share of the cost of the per diem fleet. The record indicates that, at least with respect to the Long Island Railroad, certain consideration has been given to its position in the division of revenues. Demurrage revenues which accrue to the terminating line furnish a partial offset to the per diem charges. With respect to the New Jersey & New York Railroad see *New Jersey & N. Y. R. Co.* v. *Erie R. Co.*, 318 I. C. C. 555, 562.

[116] Differences in the costs of cars apparently were recognized, since a rate of one cent per mile was charged for cars of special construction.

time basis employed for about two years in the same decade by two central-western carriers. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375. On January 1, 1888, a mixed settlement basis of 15 cents per day plus ½ cent per mile was adopted by trunk lines generally but was abandoned after a few months. Thereafter the straight mileage basis of ¾ cent per mile was resumed, decreasing to 6/10 cents per mile in 1894. In 1895 The Car Service Committee of the American Railway Association recommended that the mileage plan be abandoned and a flat daily rate of 15 cents substituted. The plan was rejected, however, on vote of the members. In 1902, pursuant to a resolution of the Association, the Committee again submitted a per diem code, in the form of an agreement, which was adopted and which substituted a charge of 20 cents per day for the mileage charge. Since that time the charges have applied solely on a time basis, without reference to variations in the amount of use given the car by different users.

The 1902 Car Service Committee's recommendations set forth certain objections to the mileage rates, which included the inability to check the accounts of foreign lines as to actual mileage, lack of incentive to return cars promptly, and unevenness of compensation in different portions of the country. The advantages of the straight time plan were said to include the ability to exercise a complete check on the compensation due, the incentive to return the cars, and the uniformity of the rate. Although the Association voted to adopt the change, there existed several different views on this point, some advocating a composite time-mileage plan.

Where the burden is distributed on a time basis only (a daily rate without regard to mileage), maintenance of records and checking on reports by owners is simplified. At the same time, the maximum effect of the collateral force of these rates in encouraging the rapid return of

cars, is obtained. While the latter consideration is not proper for calculation of the owners burden, it is a factor of considerable practical importance which has been demonstrably present in the deliberations with respect to car rental charges for many decades. It should not be ignored when considering the equities of the methods by which charges are to be distributed. It appears probable, as hereinafter discussed, that distribution of costs with reference to the days foreign cars are held on line is the most practical and equitable method of spreading those costs which are related to time and those which should be absorbed equally by all users. To the extent, however, that particular costs vary among the users according to the amount of use given the car, equitable distribution is not accomplished by reference to days on line only. In addition, under present rules, bridge carriers which receive cars after midnight and are able to deliver them to a connection before the following midnight escape the payment of any car rental charge, although their division of the revenue from the movement may be substantial.

At the other extreme is the distribution of the owner's burden solely on the basis of the miles over which the car is moved. Because of the substantial difference in average daily line-haul movements of foreign cars among the respondents, use of this method produces unequal and unreasonable impositions of costs which are related only to time or which should be shared in more equal fashion. Use of this method also results in complete loss of the incentive to prompt return of cars.

The average distances active foreign per diem cars are moved by the different respondents vary widely. Thus, the special study data for 1960 indicated differences in the daily average line-haul mileages of more than 100 miles. A few of these are indicated below.[117]

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[117] Movements of particular scheduled trains of as much as 450 miles per day occur. Exh. R-280; Transcript 6964.

TABLE 18

Carrier	Daily Average mileage[118]
L.I.	4.8
NY, NH&H	34.6
B&O	44.5
B&M	51.2
PRR	51.3
NYC	51.8
C&O	53.9
L&N	59.5
ACL	62.8
N&W	66.6
C,B&Q	75.2
Sou. Ry.	70.4
MP	80.1
NP	81.4
SP	112.4
ATSF	113.2
UP	120.9

Clearly, the usage made of foreign per diem cars, measured in terms of line haul mileage of active cars, is so varied as to require separate treatment, if possible.

The evidence is insufficient to support any findings as to the precise results of distributing a portion of the ownership burden over the line haul mileage, but a comparison made by the Cost Section indicates that they would not be inconsequential. A number of Class I carriers would not, it appears, experience any radical change in their net per diem position. The impact on many, however, greatly exceeds the estimated additional costs of the

[118] Daily average line-haul car miles of foreign per diem cars from Exh. R-1, Schedule 4, Col. 2, divided by daily average, active foreign per diem cars on line from Summary MT-2, Col. 8.

system, hereinafter discussed.[119] The comparison in Table 19, below, is between the net debit or credit balance in 1960 under the then single rate of $2.88 per car per day, and the rates indicated in Summary MT-2. The latter are based upon average car value and average mileage of foreign per diem cars on each carrier, employing costs per day and per mile as developed in Summary MT-1 and converting the mileage cost for each carrier to a cost per day paid for, so as to produce a figure applicable to time only.

TABLE 19

Carrier	MT-2 Figures Net Balance	$2.88 Rate Net Balance	Effect on Net Balance Result of use of mileage factor
AT&SF	Cr 509,494	Cr 6,545,837	— 6,036,343
ACL	Dr 1,855,613	Dr 361,825	— 2,217,438
B&O	Dr 200,554	Dr 1,897,344	+ 1,696,790
CRRNJ	Dr 2,087,207	Dr 3,810,499	+ 1,723,292
C&EL	Cr 1,022,051	Cr 866,454	+ 155,597
C&NW	Dr 320,418	Dr 3,005,182	+ 2,684,764
CMSP&P	Dr 74,247	Dr 2,079,700	+ 2,005,453
CRI&P	Dr 2,456,666	Dr 2,186,162	— 270,504
CC&O	Cr 1,609,463	Cr 2,278,921	— 669,458
C&S	Dr 779,404	Dr 979,240	+ 199,836
C&W	Dr 356,974	Dr 655,637	+ 298,663
D&H	Cr 935,112	Cr 1,563,201	— 628,089
D&RGW	Cr 9,981	Cr 1,139,820	— 1,129,839
DT&I	Cr 778,076	Cr 65,353	+ 712,723
EJ&E	Dr 697,219	Dr 2,757,474	+ 2,060,255
E-L	Dr 6,421,796	Dr 5,344,185	— 1,077,611

[119] As might be expected, most of the opposition to a system incorporating consideration of the mileage factor comes from carriers having high average daily car miles of foreign per diem cars and, conversely, the support therefor comes primarily from those with relatively low average daily mileages.

TABLE 19

Carrier	MT-2 Figures Net Balance	$2.88 Rate Net Balance	Effect on Net Balance Result of use of mileage factor
GTW	Cr 223,245	Dr 1,041,432	+ 1,264,677
GM&O	Dr 1,456,263	Dr 1,076,215	+ 380,048
IC	Cr 4,674,432	Cr 3,597,575	+ 1,076,857
Ill. Term.	Cr 167,624	Dr 333,089	+ 500,713
KCS	Dr 577,863	Dr 1,316,546	+ 738,683
LV	Dr 1,573,061	Dr 1,907,885	+ 334,824
LI	Dr 1,296,050	Dr 2,184,053	+ 888,003
L&N	Cr 8,996,503	Cr 9,260,093	— 263,590
MKT	Dr 1,466,540	Dr 1,897,344	+ 430,804
MP	Cr 1,122,793	Cr 2,131,350	— 1,008,557
Monongahela	Dr 1,048,370	Dr 1,797,206	+ 748,836
NYC	Dr 6,555,778	Dr 11,183,789	+ 4,628,011
NYNH&H	Dr 3,646,721	Dr 5,547,623	+ 1,900,902
N&W	Cr 17,013,265	Cr 18,372,614	— 1,359,349
PRR	Dr 11,534,062	Dr 14,554,737	+ 3,020,675
Reading	Dr 1,979,357	Dr 3,502,707	+ 1,523,350
SP	Cr 6,131,214	Cr 9,944,190	— 3,812,976
Sou.	Dr 4,627,898	Dr 1,621,175	— 3,006,723
UP	Dr 9,644,697	Dr 2,052,293	— 7,592,404
WP	Dr 1,072,718	Cr 45,467	— 1,118,285

* Figures shown are dollars receivable (Cr) or payable (Dr). In last column (+) indicates amount by which carrier is benefited by the MT-2 calculation; (—) indicates amount by which carrier's liability is increased or credit decreased under the MT-2 calculation.

The figures as calculated for these comparisons were not offered as precise measures of the per diem status of the individual roads, but, as a reasonable approximation of the relationship of debits and credits between the two methods of per diem-charging. Since the comparison is with the single rate, rather than with the multi-level rates, the relationships shown furnish no support for precise findings with respect to the net effect of assigning a

portion of ownership costs to mileage, under a multi-value system, as compared to a straight time rate under such system. They do, however, warrant the conclusion that the consequence of taking the mileage factor into account can be expected to be of sufficient importance to justify its use.

While the divisions of through rates received by railroads pursuant to Commission orders or inter-carrier agreements furnish no measure of the compensation required to meet ownership costs of interchange cars, and may not be considered in ascertaining the burden of such ownership, they have not been held inappropriate for consideration when weighing the various ways in which the burden might be distributed. They furnish an indication of the benefit which users derive from the cars since the divisions which carriers receive are frequently based upon distance scales. Factors prescribed in Commission decisions for application to rate scales in ascertaining division increase with increases in distance.[129] As discussed hereinafter, line haul mileage has an appreciable impact upon reduction in car value and cost of repairs, both of which are factors entering into the car rental charge. Thus, on either basis, whether it be the enjoyment of greater revenues from the transportation of the car over longer distances, or the greater impact on the ownership burden resulting from such longer movements, the element of mileage is a significant factor which should be

[129] See *Divisions of Freight Rates*, 148 I. C. C. 457, 463; *Southwestern-Official Divisions*, 210 I. C. C. 687, 717; *Southwestern-Official Divisions*, 234 I. C. C. 135, 140, 163; *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175, 224, 231 (App. D&E); *Official-Southwestern Divisions*, 287 I. C. C. 553, 593, 595 (App.); *Akron, C. & Y. R. Co. v. Atchison, T. & S. F. Ry. Co.*, 310 I. C. C. 351, 371 (App. C); *Official-Southern Divisions*, 287 I. C. C. 497, 547, 552.

reflected in the distribution of the annual burden among users of the cars.[121]

A—Time Mileage Allocations—Repair of Freight Cars:

The evidence warrants the conclusion that the use made of freight cars is comprised of and can be measured by their custody over a period of time, and their movement over varying distances. While it appears reasonable, in principle, to measure charges by assigning to each of these factors a portion of the total ownership burden, the evidence of record contains many divergent views as to the distribution between them. Certain respondents contend that depreciation of cars is solely a function of the lapse of time, while others assert that the use made of the car has a large and measurable influence on the extent of its depreciation. The various costs of maintaining and repairing the car were made the subject of a number of analyses which purported to show the proportions which were made necessary by line-haul movement, switching movements, loading and unloading, and the passage of time. Some 19 studies were made and offered in evidence. They demonstrate such divergent views as to suggest that a reliable separation of the causes of car repair costs is probably not possible beyond the broad classification between line-haul mileage and all other causes.[122]

The Cost Section adopted a separation of repair costs taken from Statement No. 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use*

[121] Assessment of an appropriate portion of the burden by reference to the line haul distance the car is moved would also eliminate in part the problem of the "no-day" cars, and require bridge carriers now avoiding contribution to bear a share thereof.

[122] Certainly a substantial overlapping of causal factors appears to be involved in producing a need for eventual repair work.

of Costs, issued by the Bureau of Accounts. It thus distributed repair costs 70 percent to mileage and 30 percent to time. The separation was developed by the Engineering Branch of the Section of Valuation as shown in the table below.

TABLE 20

Line No.	Item (1)	Use portion (Percent) (2)	Time portion (Percent) (3)	Weighting (4)
1	Car wheels—15 yr. life	100	0	.11
2	Axles (heat treated)—20 yr. life	100	0	.08
3	Brake beams, heads, and shoes; couplers, dreft gears, etc.	100	0	.13
4	Floors, sides, and ends	70	30	.22
5	Door units, tracks and mechanism	80	20	.11
6	Trucks, side frames, journal boxes and parts	100	0	.16
7	Painting, blasting, stenciling	20	80	.10
8	Wrecks and rough useage	100	0	.04
9	Weather	0	100	.03
10	Miscellaneous	50	50	.02
	Composite	79	21	1.00

As compiled, the use portion was intended to comprehend the impact of line-haul and switching activities and repairs made necessary by loading and unloading. The latter, included in Item No. 4, were reassigned to the time factor by assuming that 50 percent of that item covered such damage, resulting in a decrease of some eight percentage points in the use column,[123] and an equivalent

[123] Fifty percent of the seventy percent use factor for Item 4 is 35 which, multiplied by the weighting of .22 produces the eight percent change in allocation. The product was rounded to the 70/30 ratio used by the Cost Section.

increase in the time column. The weighting factors in column 4 for the first seven items were based upon data on file in the Engineering Branch. The last three were based on information contained in publications of the American Railway Car Institute, A.R.E.A. proceedings, and qualified by field information, conference of the Engineering Branch staff, and exercise of engineering judgment. All the percentage allocations in the first two columns are based upon engineering knowledge and judgment. As employed by the Cost Section, the portion assigned to "use" was treated as caused by movement of the car over miles of line haul and switching operations.

Additional analyses of the causes of car repairs, and their relative effect, were conducted by sixteen line-haul carriers[124] having a total ownership of some 720,415 per diem cars in 1960. The analyses were made separately by each participating carrier, with respect to its own equipment and experience. Analysis was made of the average annual cost of replacements or repairs to about 60 component parts of the cars considered, and distribution between those made necessary by line-haul mileage, switching, loading and unloading, and time, was accomplished by use of engineering judgment. The cars considered were 50 ton, 40' 6", single door, standard box cars, and, for each carrier, that type of gondola and open-top hopper car representing their largest percentage of

[124] Participating in this analysis were the Atchison, Topeka and Santa Fe Railway, Chesapeake and Ohio Railway, Chicago, Burlington and Quincy Railroad, Colorado & Southern Railway, Denver & Rio Grande Western Railroad, Great Northern Railway, Gulf, Mobile & Ohio Railroad, Illinois Central Railroad, Louisville and Nashville Railroad, Missouri Pacific Railroad, Nickel Plate Railroad, Norfolk & Western Railway, Northern Pacific Railroad, Seaboard Air Line Railroad, Southern Pacific Railroad, Texas & Pacific Lines, Union Pacific Railroad, Western Maryland Railroad, and Western Pacific Railroad.

ownership. The results of each carrier's analysis were weighted according to its ownership of the type of car and combined totals obtained, from which the following distribution of repair causes was developed:

TABLE 21

	Road-Haul Miles	Switching Operations	Loading & Unloading	Time
Box Car	37.205%	21.095%	26.184%	15.516%
Gondola Car	40.486%	22.432%	21.305%	15.777%
Hopper Car	36.580%	21.019%	16.114%	26.287%

If the above conclusions are averaged, the following result is produced:

TABLE 22

Road Haul Miles	Switching Operations	Loading & Unloading	Time
38.090%	21.515%	21.201%	19.193%

And if line haul and switching operations be combined, as well as loading and unloading and time, for comparison with the 70 and 30 proportions employed by the Cost Section, the comparable figures thus developed are 59.6 and 40.4, or, in round figures, 60 and 40.

While there is a superficial appearance of similarity in these average figures, a comparison of the 16 underlying studies reveals that it is coincidental at best. Set forth below are tables showing, for Box and Hopper cars, the proportions of repair costs ascribed by officials of the reporting carriers to the four mentioned causal factors. For box cars the combined ratios of line haul and switching to loading and unloading and time vary from 74/26 to 45/55. For hopper cars they vary from 85/15 to 37/63.

TABLE 23

Hopper Cars

Carrier	Road Haul	Switching	Load & Unload	Time	Combined Ratio[1]
NY,C&St. L.	35.428	21.138	19.748	23.686	57/43
GN	59.885	25.218	6.457	8.440	85/15
D&RG	51.163	27.076	10.808	10.953	78/22
MP	60.724	14.718	9.000	15.558	75/25
WMd.	39.296	28.097	21.760	10.847	67/33
L&N	46.560	20.693	5.051	27.426	67/33
ATSF	40.884	25.562	10.483	23.071	66/34
UP	34.889	29.246	20.207	15.657	64/36
ACL	43.086	19.516	16.415	20.984	62/38
SP	43.898	18.952	20.979	18.171	62/38
GM&O	40.185	20.786	8.668	30.361	61/39
Ill Cent	36.810	21.986	5.773	35.431	59/41
C&O	36.419	20.900	21.809	20.872	57/43
CB&Q	28.751	24.326	19.788	27.137	53/47
SAL	35.260	16.294	18.834	29.612	51/49
N&W	19.145	18.422	23.241	39.193	37/63

Spread

N&W	19.145				
MP	60.724				
	MP	14.718			
	UP	29.246			
		L&N	5.051		
		N&W	23.241		
			GN	8.440	
			N&W	39.193	
				GN	85/15
				N&W	37/63

[1] The first figure is the percentages of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

TABLE 24

Box Cars

Carrier	Road Haul	Switching	Load & Unload	Time	Combined Ratio [1]
GN	55.493	18.351	14.523	11.633	74/26
MP	54.065	15.253	12.584	18.098	69/31
L&N	40.800	22.890	21.981	14.329	64/36
D&RG	36.117	26.386	22.291	15.206	62/38
CB&Q	37.812	22.866	25.837	13.485	61/39
Ill Cent	40.516	20.836	24.143	14.505	61/39
ACL	37.467	22.572	19.985	19.978	60/40
SP	38.641	21.088	24.471	15.800	60/40
GM&O	35.650	23.183	27.660	13.507	59/41
NY, C&St. L.	36.207	23.196	28.389	12.208	59/41
WMd.	30.451	25.567	34.844	9.138	56/44
C&O	32.722	21.914	28.175	17.289	55/45
SAL	35.260	16.294	18.834	29.612	51/49
ATSF	30.191	19.596	34.197	16.016	50/50
UP	21.868	26.672	36.825	14.534	48/52
N&W	27.944	16.844	31.780	23.432	45/55

Spread

UP	21.868				
GN	55.493				
		MP 15.253			
		UP 26.672			
			MP 12.584		
			UP 36.825		
				WMd. 9.138	
				SAL 29.612	
					GN 74/26
					N&W 45/55

[1] The first figure is the percentages of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

A witness for the New York Central testified that a substantially greater proportion of the repair costs should be attributed to line-haul mileage, with relatively little allocation to time and switching. This witness did not, however, testify as to the exact proportions he considered appropriate. The Pennsylvania Railroad conducted a separate analysis of records concerning its 50 foot box cars, 70 ton gondolas, and 70 ton hopper cars, in which the repairs were ascribed to time, road-haul mileage, switching, and loading and unloading, separated according to three assumed conditions: (1) cars held on tracks without movement, (2) cars in road train service but without loads moving 20,000 miles per year for box cars and 10,000 miles per year for gondolas and hoppers, (3) cars in similar road-haul service but loaded and unloaded 18 times per year. In round figures, the result of this analysis was a distribution of 72 percent of repair costs to road mileage and switching, 11 percent to loading and unloading, and 17 percent to time.

Most of the above-described analyses of the various causes of repairs to cars were carried out by separate consideration of each portion of the car, the factors which cause wear or damage, and the relative extent of each. They were not, however, based upon tests or studies of equipment in operation under test conditions. The proportions assigned to the various causes were determined by the judgment of the engineering official or officials responsible therefor in each instance. The conclusions of the Section of Valuation represent the judgment of staff personnel in revising a similar allocation made in 1940, and published in Statement No. 4-54, November, 1954. Comparison of the individual judgments reveals appreciable and irreconcilable differences of opinion as to the cause of particular repairs and to the totals in each group. Even when the carriers are grouped by the broad geographical areas in which they operate, or their type of

service, no consistent pattern appears. No reason appears why any one of these judgments should be given greater weight than any other nor, with such widely divergent testimony, can more than general conclusions be supported.

It cannot be said that the contribution of any one of the participating carriers to the ultimate delivery of a car is more important than that of any of the others. Without the performance by each of its particular duty, the service would not be completed and none would earn revenue, whether or not it had performed its portion of the service. The switching necessary to move a car to and from its place of loading and unloading is an essential part of the overall service and of equal importance to all carriers who share the revenue. It is not disputed that using carriers bear themselves the cost of repairing damage which they cause by misuse of the car. No reason why all participating carriers should not share in the general, ownership costs which result from the shifting operations. The evidence demonstrates that it is an exercise in futility to attempt to segregate the loss in value and the repair costs generated by switching service from those generated by other causes. Reasons suggests that there is no need to make such a separation.[125] They should be shared by all users as equally as possible.

It is equally certain that repair costs, and loss in value of a car, resulting from damage done by the shipper or consignee during loading or unloading cannot be laid at the door of the originating or delivering carrier. The car is then out of their control. No reasons appears why they should bear a disproportionate share of these costs. Such costs are part of the ownership burden and arise out

[125] Car miles in switching service can only be estimated and the extent to which such service produces need for repairs as compared to line-haul mileage is not susceptible of proof. See footnote 128 below.

of the general performance of the entire service. They are also difficult to ascertain and isolate from other causes and should be shared equally by all users.

B—Time-Mileage Allocations—Depreciation of Freight Cars.

In its calculations of time and mileage charges, the Cost Section assigned 45 percent of depreciation to mileage and 55 percent to time. These proportions were developed by the Engineering Branch of the Section of Valuation, as were those for repairs, in connection with the computations underlying Rail Form A, and published in Statement 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs*. Like the similar distribution of repairs, it is based on judgment of the staff officials, rather than on specific tests. In developing the various percentages, the depreciation was first separated into a "use" portion and a "time" portion. The former purports to isolate that portion of depreciation attributable to the wear and tear due to running operations, switching operations, and loading and unloading operations. Subsequently, the loading and unloading portion was transferred to "time" and the remainder assigned as the mileage element of depreciation. All other was assigned to "time". The latter also purports to include depreciation resulting from the action of the elements and obsolescence. The distribution of the depreciation charges between use and time was accomplished by separating the tare weight of the car into 43 principal parts and assigning a portion of the weight of each part to one or the other factor. It was assumed that the relative weight of the parts approximated the relative costs for replacement of the parts. In developing the proportions, the weighted figures as calculated for box cars, hopper cars, and gondola cars were averaged. The result was 46.54 which was rounded to 45.55 for use in the cost formula. An example of this process is shown in Table 25 below.

TABLE 25

Item— (1)	Total weight (lbs.) (2)	Use (per-cent) (3)	Time (per-cent) (4)	Use portion weight (lbs.) (Col. 2 x col. 3) (5)	Time portion weight (lbs.) (Col. 2 x col. 4) (6)
Standard Steel Gondola Car					
Running gear group:					
Wheels	4,822	100	0	4,822	0
Axles	3,920	100	0	3,920	0
Springs and snubbers	774	60	40	464	310
Journal box parts	618	80	20	494	124
Brake beams and heads	470	50	50	235	235
Brake shoes	178	100	0	178	0
Brake levers, connections, hangers, etc.	253	50	50	126	127
Couplers	863	60	40	518	345
Coupler yokes	414	60	40	248	166
Coupler operating devices	47	80	20	38	9
Air brake equipment	683	50	50	342	341
Pipe, fittings and clamps	218	20	80	44	174
Levers, rods, supports, etc.	472	50	50	236	236
Hand brake	144	50	50	72	72
Undertrame group:					
Truck side frames and journal boxes	2,986	20	80	598	2,390
Truck bolsters, center plates and side bearings	2,196	20	80	439	1,757
Center sills	4,360	20	80	872	3,488
Bolsters complete) Under	2,878	20	80	576	2,302
Cross bearers) frame	2,718	20	80	544	2,174
Cross ties)	1,100	20	80	220	880
Draft gear, followers and carriers	749	50	50	375	374
Draft gear keys and retainers	108	50	50	54	54
Center braces, plates, etc.	683	20	80	137	546

TABLE 23

Item—	Total weight (lbs.)	Use (per-cent)	Time (per-cent)	Use portion weight (lbs.) (col. 2 x col. 3)	Time portion weight (lbs.) (Col. 2 x col. 4)
(1)	(2)	(3)	(4)	(5)	(6)
Standard Steel Gondola Car					
Body group:					
Side construction	12,591	50	50	6,296	6,295
End construction	2,389	50	50	1,195	1,194
Floor construction	7,505	80	20	6,004	1,501
Inside stake pockets	369	60	40	221	148
Handholds, ladders, sill steps, etc.	190	20	80	38	152
Rivets and welding rod	838	50	50	419	419
Bolts, nuts, washers, cotters, etc.	32	50	50	16	16
Paint, oil and waste	334	50	50	167	167
Miscellaneous	22	50	50	11	11
Total tare weight of gondola car	56,163			29,967	26,196
Composite for gondola		53	47	29,766	26,397

[1] "Use" portion computed by dividing the figure of 29,967 pounds from column 5 by the total weight of 56,163 pounds shown in column 2, percent equals 53.36. This figure was rounded off to 54 percent and used. The remaining portion (47 percent) was chargeable to time.

[2] Figure of 29,766 used, being 53 percent of total tare weight of 56,163 pounds.

While the use of this allocation is supported by certain respondents, the validity of any allocation is challenged by others. No other evidence was offered respecting a proper method of apportioning depreciation between time and mileage. The distribution described above is founded in the opinion of staff officials and is not supported by any demonstrable tests or studies. It relies heavily on the assumption that there is a logical relation between the weight of the parts of a car, and the cost of those parts.

No evidence was offered to support this assumption, and in view of the differences which might be expected in the costs of labor and machining as between various parts, it is open to some doubt.[12] The analysis is, however, the only evidence of record on the point.

Depreciation for recording purposes is a function of the passage of time. It is an accounting device to explain the disappearance of funds expended for an asset and, in a sense, to require the asset to earn back its cost. It is accomplished by charging a portion of the cost of that asset, less its estimated salvage value, against income on an annual basis over a predetermined period of years. Insofar as depreciation for this purpose is concerned, it is immaterial how much or how little use is given the asset.[13] Depreciation, as used in these per diem calculations, however, has to do with the wearing out of the car, and is defined as that portion of the car's loss in value not made up by repairs credited to Account 314. The allocations of this loss in value between mileage and time were first calculated for use in Rail Form A, a formula designed to develop the out-of-pocket costs for various weight shipments moving in different types of cars over different lengths of haul, as a measure of the adequacy of rates to be charged shippers for the service. For this purpose, it was considered desirable to relate the disappearance of the value, in part, to the distance over which freight was moved, since the distance a carrier moves freight is a convenient and useful tool for measuring the relative costs, and rates, of the service.

It is contended that since regular repairs are made at current prices, freight cars do not lose value because of

[12] A value per pound system is also used, however, under AAR rules to settle certain claims for destroyed property.

[13] In some industries property depreciation may be based upon units of use. Such is not the case here.

physical deterioration, and the loss in value charged to depreciation is caused by obsolescence due solely to the passage of time. That a freight car can be kept in useable condition for extremely long periods of time by frequent repairs and careful maintenance does not alter the fact that at the time it is retired it has a salvage value which is only a small percentage of its original value. It cannot be found that repairs during its operating life bring it back regularly to the value and condition it possessed when new. The decision to retire a car, or group of cars, involves the balancing of a number of factors, and a determination as to whether more profitable future operations will result from expending funds to keep the cars in operation, or in expending such funds to purchase replacements. Inherent in the analysis is consideration of the physical condition of the car, the extent of deterioration, and the cost of keeping it in useable condition. The theory that no part of the loss in value of a car at retirement results from deterioration in its physical condition and ability to perform adequate service, due to wear and tear in use, cannot be accepted. Use of the term depreciation as a word of art in the accounting field, to mean a charge made on a time basis without regard to use, does not foreclose consideration of the causes of the loss in value.

Both the annual repair costs and the loss in value of the car not restored by such repairs are found to be directly affected by the use made of the car. That part of the use represented by line haul mileage is found to vary to such degree among users as to require separate assignment of such costs. Reference to Tables 23 and 24, above, reveals that the lowest estimate of the percentage of repairs caused by line haul mileage is about 20 percent. The average of estimates for all three classes of cars is about 38 percent, and the great majority of the estimates for this factor are between 30 and 40 percent. Estimates by

the Pennsylvania Railroad, and those used by the Cost Section, do not separate switching from line-haul but employ approximately 70 percent as the combined effect of these two causes. Although the repairs necessitated by switching service are considered, by most witnesses, to exceed those necessitated by line-haul service on a mile for mile basis, there is no agreement as to the extent of the difference. Equated car miles of per diem cars in switching service, as calculated by the Cost Section for 1960 was 2,114,616,465, while total line haul and equated switching miles were 23,790,915,732. The approximate 10 percent of equated switching miles suggests that about 63 of the 70 percent repairs assigned to the two causes was related to line-haul mileage. Both the Pennsylvania and the New York Central which, as noted, also estimate a high proportion of repair costs to line-haul, are proponents of the use of mileage as a measure of allocating the ownership burden among users. The sixteen respondents which joined in the studies summarized in Tables 23 and 24 are all opposed to this procedure. Certain of these respondents, however, estimated that line-haul mileage causes from 46 to 60 percent of repair costs. Upon all the evidence of Examiner finds that 50 percent of annual repair costs may reasonably be treated as related to the line-haul mileage over which the cars are moved.

In addition, some portion of the loss in value of a car over its lifetime must be ascribed to the deterioration resulting from the impact of line-haul movement. The Section of Valuation, as noted above, estimates the combined effect of line-haul and switching mileage produces some 45 percent of this loss. Considering the relationship between equated switching miles and total miles, this would suggest that approximately 40 percent was ascribed to the effect of line-haul mileage. No purpose would be served by attempting to resolve the dispute as to whether the accounting charge for depreciation may be treated as other than a purely time concept. It is doubtful that a

basis of separation of loss in value between time and use, as causes, could be reached upon which all interested parties could agree. Without regard to the manner in which record is kept of the annual loss in value of the car, it must be found that some portion thereof results from physical deterioration due to its use. On the record herein, and in the absence of persuasive evidence to the contrary, the Examiner finds that 40 percent thereof may reasonably be treated as related to the line-haul mileage over which the cars are moved.

Certain other allocations between the factors of time and mileage were made in Summary MT-1, which furnished the basis for subsequent calculations. This summary employed the same elements and total costs as did the calculation of costs based solely on time, and set forth in Summary T-1, but distributed them between factors of time and mileage, to produce a time cost per active car day, and a mileage cost per car mile, which included equated switching miles.[128] It did not adjust the time cost per active car day by the relationship between active days and per diem days paid for, as in Summary T-1, since Summary MT-1 was not designed to be used directly to establish costs. Summary MT-1 figures were subsequently used in Summary MT-2 and MT-3 for the latter purpose, and at that time an adjustment was made.

[128] "Equated switching miles" is an artificial figure which must be estimated due to the fact that records are not maintained of car mileages in switching movements. It was developed from data in Rail Form A, which indicated that, for each locomotive mile in switching service, there were 3.3 car miles. The mileage is then further increased by application of a "rough usage" factor of 2 to intended to represent the relationship of wear and tear on the car in switching service to line-haul service. The result is to increase locomotive miles in switching service 8½ times, to develop car miles in switching service. Validity of the "rough usage" factor was not shown. Apparently it is also based on "engineering knowledge and judgment."

In MT-1, assignments of cost to mileage and time were made as follows:

	Mileage	Time
Freight car repairs and associated costs	70%	30%
Depreciation on cars	45%	55%
Depreciation on repair facilities	70%	30%
Property taxes on cars	0%	100%
Property taxes on repair facilities	70%	30%
Payroll taxes	70%	30%
Return on investment in cars	0%	100%
Return on investment in repair facilities	70%	30%
Hire of cars	19.83%	80.177%
Return on working capital	59.012%	40.988%

The 20 80 ratio applied to hire of freight cars was developed by determining the combined ratio of depreciation and returned on cars. The 59 41 ratio applied to return on working capital was developed by determining the combined ratio of repairs; property taxes on cars and repair facilities, payroll taxes and hire of freight cars. The 70 30 and 0 100 ratios were employed according as the items were considered related or not to the apportionment of repair costs. It is contended that the allocation of any portion of depreciation, property and payroll taxes, return on investment, hire of freight cars, and return on working capital to mileage is erroneous, and that all are exclusively related to the passage of time. Attention is called to the fact that the Cost Section allocated property taxes on cars and return on investment in cars entirely to time, but failed to so treat the other items.

Nearly $49,000,000 expended for hire of freight cars was apportioned between mileage and time by use of the ratio produced by the relationship of the mileage and time totals for depreciation and return on depreciated

investments in freight cars. Some portion of the hire of these cars is measured by mileage but the record fails to show the extent thereof. The item, however, is related to, and to a large extent takes the place of an allowance of sums for depreciation and interest on such cars. Distribution of a portion thereof to mileage as accomplished by the Cost Section is found to be appropriate. In a multi-level system of rates, this item is covered by the allowance for interest and return of capital (or depreciation).

Separation of depreciation, interest, and taxes on repair facilities, taxes on wages and interest on working capital, between time and mileage because repair costs of cars are so separated, while perhaps appropriate in some instances, does not appear to result in a fair distribution of the costs here. Separation of ownership costs between time and mileage presupposes that the total amount necessary to compensate the owner has been determined. The separation, if accomplished, has as its purpose the equitable apportionment of the cost among the various users of the car, including the owner when it makes use of its own cars. If the various items of expense are to be apportioned in part to mileage because movement of the car over varying distances is a partial cause of the expense, then some logical causal connection should appear.

C—*Time Mileage Allocations — Depreciation of Repair Facilities.*

While the wear and tear from use may have some causal connection with the loss in value of repair facilities, it is much less apparent than with respect to freight cars. The former are long-term properties which would appear to be affected to a much greater degree by changes in machinery and equipment, and in the character of the cars and equipment requiring repair, than by wearing out of the facility in making the repairs. Assuming, however,

that the latter factor is significant, and that there is some relation between the need for repairs due to mileage and the wear of the facilities in making the repairs, the connection is too remote and conjectural for application here. Depreciation of repair facilities does not appear to have a measurable causal relation to the mileage of the freight cars. The passage of time which, because of innovations and changes in equipment and operations, eventually renders the facilities uneconomical, appears to be the primary cause of their loss in value.

D—*Time-Mileage Allocations—Interest on Investment in Repair Facilities.*

The Cost Section allowed, as interest on the undepreciated balance of the original cost of freight cars, 6.62 per cent before allowance for federal income tax. No portion of this was allocated to mileage as a causal factor. A similar allowance on the undepreciated balance of the original cost of repair facilities was separated between mileage and time on the same 70-30 basis used for repair costs. No apparent causal relationship exists between the distance freight cars move and the earnings derivable from the investment of funds in this, or other possible income producing properties. Certainly, if mileage has no such relationship to interest return on the cars themselves, there would appear little basis for finding a relationship to the identical type of cost of the repair facilities.

E—*Unit-Mileage Allocations—Property Taxes on Repair Facilities.*

In similar fashion, the Cost Section allocated property taxes on freight cars entirely to time, but allocated property taxes on repair facilities in the 70-30 proportions used for distribution of repair costs. There is no evidence that the property taxes vary with the amount of

repairs accomplished and, there being no causal connection with the amount of repairs, it is difficult to find any with the more remote factor of the cause of the repairs.

F—*Time-Mileage Allocations—Payroll Taxes.*

These comprehend railroad retirement and unemployment insurance taxes applicable to the ownership burden. There is no evidence that these taxes vary with the distance over which the freight cars are moved, nor in any established relation to the repairs resulting therefrom. While additional repairs may cause higher repair employment and consequent increases in these taxes, there is no basis for a finding as to the extent to which car mileage is a contributing factor. The taxes are based upon wages, paid upon a time basis, and should be borne by users on that basis.

G—*Time-Mileage Allocations—Return on Working Capital.*

Return on a fund of working capital was also apportioned in part to mileage. The proportion, in this instance, was developed by totalling the amounts assigned to time and mileage for car repairs, property taxes, payroll taxes, and hire of freight cars, and deriving a ratio therefrom. It thus represents an amalgamation of ratios of 70.30, 0.100, and 19.83 80.17, the last being itself the product of a prior amalgamation. It is difficult to perceive how this apportionment can measure the causal impact of mileage on the generation of the allowed return on the fund necessary as working capital, even if such a causal relation existed. As noted above, there appears no such connection between the distance freight cars move and the earnings derivable from invested funds. Interest income is customarily computed with reference to the amount of time involved, and should be so apportioned.

II—*Allocations to Time.*

While the use made of foreign per diem cars measured by line-haul mileage varies widely as between carriers, the length of time active cars are held on line appears more stable. Since nearly all lines perform both originating and terminating functions, and most act as intermediate, or bridge, carriers on various car movements, no reason appears why, in general, the average detention time should vary widely.[129] Little evidence was introduced on this point, but tests on the Long Island, a predominately terminating, and net per diem debtor road, indicated an average of about 9 days detention per car. Detention of foreign cars on the New York Central in 1960 also averaged about 9 days. A similar average was indicated by tests made in March and July, 1964, on the Atchison, Topeka and Santa Fe. A random sample of foreign car movements in March, 1964, on the Southern Pacific indicated an average detention of about 12 days. The latter two carriers are large originators of traffic and net per diem creditor lines. The Pennsylvania R. R. average for 1959-1963 was about 8.3 days. This evidence is insufficient to warrant a finding that the sharing of car use, insofar as the average time cars are held on line is concerned, is substantially the same for all carriers. The variations, however, appear much smaller than those involved in the average car mile factor and distribution of a portion of the ownership burden over the number of days the car is used may provide a more even sharing

[129] There are some exceptional situations. An example is that occurring in the assembling of bulk cargoes for further movement by water. Greater detention occurs in these instances, and allowance of greater free time is not unusual. Equitable sharing of the excess time in these cases could best be accomplished by special arrangements for per diem reclaims among the lines involved in the movements. Adjustment of divisions of revenue to take care of special situations is possible. *New Jersey & N. Y. R. Co. v. Erie R. Co.*, 318 I. C. C. 555, 562.

thereof. Costs which should be shared equally, and those which are unmistakably related to the passage of time, should be distributed on this basis. These include the remainder of loss in value and the remainder of repair and maintenance costs as heretofore listed.[139]

The ownership cost for cars of varying costs, according to the year built, may be approximated by adding to the appropriate investment cost from Table 15, the indicated average repair cost of $390.00. Of the total, the portion chargeable to mileage is represented by $178.00 of repair costs[140] plus 40 percent of the loss in value for the year. Table 26, below, assumes this loss to be $30.00 per $1,000, allowing a 10 percent salvage value and a 30 year life. The portion chargeable to the mileage factor thus becomes $12.00 per thousand dollars of original cost.[141] The total cost, less the portion ascribed to mileage, divided by

[139] It is urged that repairs made necessary by loading and unloading activities, and by switching operations, should be distributed over the mileage operated, on the basis that the cost would thus be spread in relation to the distribution of revenues. It is not contended that these costs are related to line-haul mileage, and the result would be an uneven and arbitrary imposition on this portion of the lading. The impact sought to be avoided by this theory is that due to the higher total days of detention over the years incurred by predominately terminating carriers. The particular problem of the latter, however, appears to stem most from their inability to earn offsetting per diem credits by use of their own cars that incur longer detention per car on line. Adjustment of the per diem charge to reflect this disability appears both improper in principle and of doubtful effectiveness.

[140] Taken from the 1960 analysis which indicated repairs cost of $356 per car and costs of depreciation, interest, and taxes on repair facilities, payroll taxes and interest on working capital of some $41 per car. One-half of the indicated cost of repairs is $178.00.

[141] This leaves assignable to mileage the increase resulting from providing for the effect of inflation, a cost not related to mileage.

and per diem payable days[1] produces the figures shown as time costs per day. The portion ascribed to mileage, in each case, divided by the indicated 1961 average of approximately 17,000 miles per car produces the indicated costs per mile of line haul movement.[2]

Subject to such further refinements as may result from future studies, it is found that the distribution of the ownership burden may be reasonably determined by annual calculation and separation of investment and repair elements as described above. Since the 1961 data is the latest available on this record, the ratios and assignments based thereon may reasonably be employed until more recent information becomes available. From El, Schedule 2, and Summary I-1, lines 14 through 18, provide a method of approximating the per diem payable days of foreign cars for more recent years, based upon the 1961 ratio. Equitable distribution of the total costs, however, requires that the ratio developed on Line 24 be multiplied by the total active per diem car days on Line 14, to develop the car day divisor. Table 20 sets forth the time and mileage rates which, using cost data through 1961, would reasonably have distributed the ownership costs among the various using lines, including the owners when acting as users of their own cars.

[1] The average per diem payable days over the period 1961-1963 inclusive.

[2] Average load mileage of all per diem cars for the 3 years 1961-1963 multiplied by 365 active car days.

> by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

While this issue seems not to have been squarely presented to the Commission in the proceedings which led to its 1955 decision, it was raised on appeal to the three judge court in Massachusetts and there held, one judge dissenting, that Section 1(11) of the Interstate Commerce Act imposes a duty on carriers to charge no more than reasonable compensation for the use of cars; Section 1(13) empowers the Interstate Commerce Commission to consider complaints alleging excessive car hire charges, Section 16 empowers the Commission to award damages for excessive charges, and that, therefore, Section 5(d) of the Administrative Procedure Act empowers the Commission to make declaratory orders with respect to past charges. Section 1(14)(a) was not considered since the complaint in Docket 31358 expressly disclaimed any intent to invoke action pursuant to that portion of the statute. On appeal, the United States Supreme Court did not find it necessary to pass on this issue, since the proceeding was being remanded to the Commission for further hearings. Thereafter, this defendant, together with the Boston and Maine and the New York, New Haven and Hartford, filed a motion to dismiss the complaint and to vacate the Commission's order of March 24, 1959, reopening the proceeding, on the ground, among others, that the Commission had no jurisdiction to promulgate or establish a rule relating to compensation payable for car-use effective retroactively for any past period. The motion was denied, and reconsideration thereof, requested

on the basis of the Supreme Court decision on May 18, 1959, in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, was also denied. It is apparent that any further consideration of the issue of jurisdiction with respect to past rates rests with the appropriate appellate courts.[144] As matters now stand, it must be ruled that the Commission has jurisdiction to make findings as to the reasonableness of past car rental rates.

In giving further consideration to the issues in Docket 31358, certain questions raised by the United States District Court require attention. These are:

1. The propriety of fixing the car-day divisor by reference to the average utilization of per diem cars over a period equal to the average age of all cars in the per diem fleet.

2. The propriety of rejecting original cost as a measure of depreciation and base for interest on investment, and the employment of reproduction cost for that purpose.

3. The propriety of subdividing Account 314, so as to separate and make possible the elimination from the calculation of per diem costs, those items unrelated thereto.

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[144] The Supreme Court dismissed the appeal "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." Section 1(14)(a), which seems to speak in futuro, apparently would not confer jurisdiction, even applying the principle indicated in *Hewett-Robins* v. *Freightways*, 371 U. S. 84, 87. If jurisdiction is not present, the Commission has not the authority to render an advisory opinion, even at the request of a Court in aid of proceedings pending therein. See *United States* v. *Garner*, 315 I. C. C. 139; 319 I. C. C. 383; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U. S. 246, May 7, 1951.

4. The propriety of calculating car rental charges giving appropriate effect to both the time cars are held by users and the distance they are moved, that is, the time-mileage plan.

B.—*Car Day Divisor.*

Approximation of car usage to be anticipated in the future by reference to the average usage over recent past years cannot be considered unreasonable in principle. Choice of the past period to be used is largely a matter of judgment. The fixing of the past period, however, measured specifically by the average age of all cars in the fleet, is, as discussed earlier in this report, of extremely doubtful validity. Comments in Section II of this report with respect to approximation of utilization for future years are applicable here. For the purpose of measuring the reasonableness of the past rates this point seems of no great importance. The end sought in Docket 31358 is a determination as to the just and reasonable rate which should have been applied during each of the periods involved. It is not necessary to pass on the reasonableness of the decision to assess the challenged rates. Information is now available as to the utilization prevailing during the periods the challenged rates were assessed, some of which was made of record, and it is unnecessary to estimate the utilization or repair costs encountered. The issue today is not whether the AAR staff acted reasonably on the basis of information then available in estimating the ownership costs, but rather, on the basis of information now available, whether the estimates were in fact correct.

C.—*Reproduction Value Base.*

Consideration has already been given to the use of reproduction cost as a base for calculation of car rental charges and to the extent to which fairness to owners requires recognition of decreases in the purchasing power

of the dollar. The discussion in Section IV of this report is applicable here. As pointed out above, the use of a charge to depreciation based on the full cost of the car provides a measure of the owner's capital cost burden only if it has paid the full purchase price itself. Even if this were the fact, however, the evidence fails to establish that the increase in the owner's car rental income due to use of the estimated current cost of constructing the average car as a base in place of the original cost, bears any relationship to extra amounts needed to meet the ownership burden of its existing fleet. The evidence of record does not permit a determination as to whether owners of cars in the periods during which the single rates applied would have recovered more or less than their overall ownership burden, calculated on the actual cost of the cars, as a result of balancing of excess recovery on low cost or fully depreciated cars against inadequate recovery on high cost cars.

In fact, from 60 percent to 100 percent of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. Because of this, allowance for depreciation and interest using the reproduction cost of the average value car necessarily produced revenue per car more adequate to meet the ownership burden on cars of higher than average value than had been believed. At the same time, use of reproduction cost of the average car as a base for charges to depreciation and interest greatly inflated the excess recovery on cars of less than average value.[145]

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[145] On December 31, 1961, a sampling of 974,386 per diem cars out of a total of about 1,600,000 cars, indicated that 74 percent had a depreciated original cost of less than $4,000. Nearly 55 percent had a depreciated original cost of less than $2,000. These cars received per diem which included allowance for depreciation and interest based upon a reproduction cost, undepreciated, of $7,887, and a depreciated reproduction cost of nearly $4,400. Many of these cars were over 30 years old and had already been fully depreciated. Not only did they receive credit for depreciation and interest, but it was calculated on a substantially higher base.

The impact on the total ownership burden of various owners was obviously as varied as the average value and utilization of their fleets varied from the nationwide averages.

Notwithstanding the unreliability of the cost of the average car as a base to measure the compensation needed to meet the ownership burden in recent years, available records permit no other method for the past. There is a need, as discussed earlier, to reflect the change in purchasing power of the funds actually expended at earlier dates. It thus appears proper to apply the cost index to that portion of the original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that 40 percent of the annual depreciation charge on an original cost base makes adequate provision for compensation to owners for this element of the ownership burden.

Depreciation charges on repair facilities have customarily been based upon undepreciated ledger value, although AAR calculations have been made on reproduction values for comparative purposes. The past rates here in issue, with one exception, were based on calculations which employed ledger value of these facilities to compute depreciation. All calculations since 1953 have employed ledger value, and no contention is made that any other base is essential to compensation of owners. The long life of these facilities and the fact that they are maintained by repairs at current prices, indicates that the original cost, or ledger, basis, is preferable.

Interest on the depreciated balance of the investment in both freight cars and repair facilities has been computed on varying bases in recent years. The calculations underlying the $2.40 rate used the average of depreciated reproduction value and depreciated original cost. Calculations underlying subsequent rates have used repro-

duction value. Computation of interest on this base was approved by the Commission in 1949, in *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, 392-393, and again in the prior report in Docket 31358. Apparently, the conclusion was based, in part, upon certain statements appearing in the 1909 opinion of the United States Supreme Court in *Knoxville* v. *Knoxville Water Co.*, 212 U.S. 1, 13-14. The comments there, however, had to do with the calculation of the value of the property devoted by the owners to the public service function, which was to be used as a base for determining a fair return. The present problem is not the calculation of proper charges to customers who bring new money into the industry which must meet the costs of operation, replacement, and provide for profits. It is, rather, the problem of assigning between and among a group of carriers engaged in multitudinous joint ventures, the burden of acquiring and maintaining the vehicles used by all. No movement of new money into the industry to provide for replacement is involved. The owner is to be compensated for the burden undertaken with respect to the car being used, to the same extent that the user would undergo such burden were it the owner.

The assertion that those who rent cars should expect to pay rentals based on present values ignores the fact that the relationship involved here is not that of a customer renting a vehicle from a lessor having no interest in the use to which it is put.[146] Railroads are not in the business of acquiring freight cars to rent to others. Value

[146] In the instance where a carrier makes use of a foreign car for movements in violation of the car service rules, it can more reasonably be said that it is "renting" the car. Conceivably, a higher charge would be appropriate in such instances but this is a problem having to do with penalty charges to enforce the car service rules, not with compensation to the owner for the ownership burden.

of use to either the owner or the user is not part of the criteria. All railroads have a joint and mutual interest in the cars owned and used in effectuating the services which they tender to the public. The concern here is to share equitably in the cost of acquiring and maintaining those cars, according as they are used, not in providing an independent lessor with sufficient income to enable it to replace its equipment and make a profit. The profits which flow into the industry as a whole, and which must be looked to for these purposes, are derived from freight charges made to shippers for the service.

No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculations for rates in prior years. The extra income produced by the use of the reproduction value base in calculating interest charges has not been shown to have a rational relationship to the costs of the cars in use. Basis for this charge should be the depreciated original cost.

D—Account No. 314.

The Uniform System of Accounts for Railroad Companies, prescribed by the Commission pursuant to Section 20 of the Interstate Commerce Act, provides, inter alia, for the recording of certain costs in Account No. 314, entitled "Freight-train Cars; Repairs." It is described as follows:

> "(a) This account shall include the cost of repairing freight-train cars and appurtenances, and the cost of repairing motor equipment affixed to freight-train cars engaged in transportation service; also cost of small hand tools used in repairs.

This account shall also include the net loss sustained on account of the destruction of foreign freight cars in the carrier's transportation service and amounts paid to others for repairs of freight cars for which the carrier is liable.

(b) A list of freight-train cars and appurtenances to such cars appears in property account 53, 'Freight-train cars.'"

The cars and appurtenances listed in Account 53 are as follows:

"Ballast (commercial)
Beer
Box
Cabin
Caboose
Charcoal
Coal
Dump (commercial)
Flat
Fruit
Furniture
Gondola
Gondola (hopper)
Gondola (long)
Gun truck
Hay
Lime
Logging
Oil tank
Ore
Platform
Poling
Poultry
Produce
Rack
Refrigerator
Stock
Tank and water (when used as commercial cars)

Air brake equipment, including hose.
Cooking equipment and untensils
Heating equipment
Ice boxes
Lamps and fixtures
Seats
Speed recorders
Train-signal equipment, including hose.
Water tanks."

Certain expenses, related to maintenance and repair, are recorded in separate accounts. These include such

items as superintendence, stationery and printing, and injuries to persons. The Uniform System of Accounts also contains certain explanatory matter with respect to the recording of maintenance expenses which provide in part as follows:

> "3-1 Items to be charged. (a) The accounts provided for maintenance . . . are designed to show the cost of repairs and also the loss through depreciation of the property used in transportation operations, including expenses resulting from ordinary wear and tear of service, exposure to the elements, inadequacy, obsolesence, or other depreciation, or from accident, fire, flood, or other casualty."

In *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291, 300, the Commission observed that:

> "The Subcommittee on Mileage and Per Diem, in 1951, came to the conclusion that a proper per diem charge could be more readily determined if account 314 could be subdivided, and recommended that all the railroads do so beginning with 1952. The subcommittee found that there was 'considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402.' It was of the view that 'it would be better if car repairs for cabooses could be eliminated from account 314 and caboose-car days eliminated from the freight-car day divisor.' The subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately owned mileage cars, as well as cabooses, and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The

> general committee disapproved this recommendation because of the additional expense which would be required for such detailed accounting."

Pointing out that the recommendation of the subcommittee deserved further consideration, the Commission concluded that it was not desirable to delay its decision pending an effort to provide additional data and held that car-repair costs should be determined in the manner theretofore specified in its 1949 report. The District Court observed that while it might be within the Commission's competence to reject the recommendation in the interest of expedition,[147]

> ". . . we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of per diem and also to show that such a break down was not impractical." 162 F. Supp. 289, 295.

Insofar as analysis of past per diem calculations is concerned, nothing can be accomplished by way of breakdown of these major repair accounts. Concededly, the multitudinous cost items entered therein over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Cost Section in 1960 dealt with several of the mentioned separations, and the

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[147] Subsequent to this report a special committee of the AAR was appointed to study the recommendations of the sub-committee. It reported that the proposals for more detailed accounting were unwarranted refinements and not essential for the determination of freight-car ownership cost.

analysis based thereon took into consideration such of these factors as were considered significant. At most, the recorded totals of the past accounts can be separated by use of the ratios indicated in the 1960 studies, to the extent it appears that reasonably reliable results can be expected. For the future, analysis of Account 314 costs can be accomplished, either by use of appropriately designed random samplings of the data, or by more detailed reporting in the accounts. The record herein would not warrant a finding as to the precise form any such breakdown should take, nor as to the relative usefulness, cost, or practical accuracy, as between the two methods. A reasonably accurate measure of the significant costs, developed by either method, would appear acceptable.

E—Time Mileage.

The substantial difference in use of cars measured by line-haul mileage has already been considered. It has been found appropriate to assign a portion of the ownership burden to the line-haul mileage over which users move foreign cars. No records are now available with which to determine the actual mileages, by car, of foreign per diem cars on the defendants' lines during the periods the challenged rates were in effect and the only method shown on this record by which recognition might be given to a mileage factor in judging the past rates is of the type set forth in Form H as Summary MT-2.[148] This method may be employed to calculate a daily cost separately for each carrier, as well as an average for all carriers. It is contended that it will produce an appropriate measure of past rates if adjusted by the car repair deficiency.

Consideration was given to use of the car repair deficiency as a deduction from the per diem rates in Section

[148] A method similar to one suggested during the 1954 hearings by a witness for the Long Island Railroad.

3 of this report. It is the Examiner's opinion that it would be no more appropriate for application to past rates than for application to present or future rates. For the purposes of Docket 31358, however, it should not be considered in any event. As amended, the complaint seeks specific findings as to the just and reasonable rate, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. If, in the opinion of those courts, there are legitimate offsets to the claims pending before them, the decision must be made by them. The per diem charge which is fair and reasonable must be measured by an equitable distribution of the total ownership burden. It exists independently of such offsets and must be found without reference to them.

In the calculations which follow, per diem costs have been computed on a time-only basis, and employed, in the first instance, for comparison with the AAR rates for the same periods, to provide a measure of the reasonableness and compensativeness of the latter. As to the great majority of the railroads which assessed and paid charges computed on the time-only basis, pursuant to their contractual obligation under the per diem agreement, findings on this basis are appropriate. The defendants having a present interest in Docket 31358, however, withdrew from the per diem agreement prior to the institution of the rates now in issue. They are entitled to separate findings as to their individual liabilities based upon that method of per diem cost calculation which most fairly distributes the ownership burden. Separate findings with respect to these parties which reflect, to the extent permitted by the evidence, their particular use of foreign per diem cars follow the findings on a time-only basis.

F—Past Rates.

(1) Discussion.

The record contains, in varying detail, the calculations made by the AAR staff based upon the periods July 1, 1955, to June 30, 1956, calendar year 1958, and calendar year 1961. As an aid to consideration of the past rates, there were introduced in evidence certain calculations based upon the T-1 formula in Form H, for the years 1953, 1956, 1959, 1961 and 1962.[149] Calendar 1960, the test year for the cost section studies, is also of record. The T-1 calculations were based upon the expenses and statistics for the particular years, using the original cost basis for depreciation and interest charges. Additional T-1 calculations were introduced which employed the reproduction cost basis.[150]

Both the T-1 calculations and those made by the AAR in support of the various past rates purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Summary T-1 calculations employ the Annual Report data for charges to depreciation plus an allowance for assumed depreciation on fully-depreciated cars. In place of using a de-

[149] Exhibits R-41, R-42, R-43, R-245, R-246. Only the daily figure was introduced for 1949 and 1951.

[150] Exhibits R-33, R-34, R-35, R-36.

preciation charge for cars leased from non-railroad owners, the T-1 method includes the payments made to such owners as shown in the Annual Reports, with minor adjustments. The total of the latter amount and the depreciation charges on per diem and non-per diem cars, converted to a reproduction base, would cover substantially the same cost elements as the AAR calculation. Where a single average rate is being calculated for all cars, the method used by the Cost Section appears the more accurate. In the revisions hereinafter made to the AAR calculations, the charges for depreciation of cars have been adjusted to eliminate certain apparent excess amounts, and so as to reflect recovery of 40 percent on a reproduction cost base and the remainder on an original cost base. Reasons for this treatment are discussed in Section IV and VII, supra.

The AAR estimated the deadhead haul cost of repair material, referred to by the Cost Section as non-revenue freight, by taking 6.06 percent of the total of the material proportion of the freight car repair proportion of general expense, maintenance of shop and equipment accounts, and the material portion assigned from Account 314. The percentage was based upon a study made in connection with Docket 17801, *Rules for Car-Hire Settlement,* 160 I.C.C. 369, while apportionment of the various accounts was based on studies made in 1956.[151] The Cost Section analyzed the 1960 annual report accounts to isolate expenses applicable to non-revenue freight and the cost per ton-mile of revenue and non-revenue freight. From the special studies, ratios were developed to estimate the ton-miles of non-revenue freight applicable to equipment

[151] The case cited was decided January 7, 1930, and the study was apparently between twenty and thirty years old during the period it was used by the AAR for the calculation of rates here in issue.

repairs, and the consequent cost. Further analysis of repair accounts in the Annual Reports developed the separation of this amount between ownership costs of per diem cars, and other costs.

Adjustments used by the AAR to Account 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the twelve months ending June 31, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of Account 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total Account 314.

The Cost Section analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate, based upon the 1952 data, the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Cost Section studies in 1960 indicated that some 45 percent should be so assigned.[152] Employment of 55 percent of the total labor costs of train yard and interchange inspection from Account 314 is found to assign a reasonable portion of inspection costs to the inspection of home and foreign cars. Although held to be appropriate for inclusion as ownership costs, inspection costs attributable to foreign cars

[152] Exh. R-1, Work Table 1, Sheet 2, Line 43, Cols. 6, 8 and 9.

were excluded in the 1949 and 1955 reports because of the finding that they had not been reimbursed by owners. As described above, in subsequent calculations the AAR also excluded such costs. The propriety of this deduction has been discussed in detail in earlier portions of this report. It is here found that all appropriate ownership costs should be included in calculating the car costs and the consequent rate, and that appropriate revision of AAR rules for reimbursement should be effectuated to eliminate any deficit in this factor for the future. For the past, as heretofore noted, if any offset is to be allowed for this factor, the decision lies with the Courts.

The Long Island R. R. points out that an adjustment in the percentage deduction of non-ownership costs from inspection costs should be made to eliminate the effect of including bad order and surplus cars in the calculation used by the AAR. Applied to the calculations for 1958, the result would be to increase the percentage of inspection costs assigned to non-ownership activities from 64.89% to 69.04%. As discussed above, however, this percentage includes the inspection costs of foreign cars, which should not be excluded. Application of the proportion as determined by the 1960 studies eliminates this criticism, and includes all proper inspection costs.

Deductions made by the AAR from Account 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its

own car. Clearly, the cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of Account 314 total repair costs arose from this source.[153] In the absence of other data, it is found appropriate to reduce the ownership costs for the 1956 and 1958 calculations by that percentage of the appropriate Account 314 figures.

Most of the other cost items employed by the AAR are apportioned to a large degree by use of the ratio that the adjusted amount of Account 314 bears to the total amount of equipment repairs. As a result, the correction of the adjusted figure produces changes in these other figures. When finally reduced to ownership costs per car per day, however, these changes are not substantial. The method used to apportion property taxes is substantially the same in both the AAR and Cost Section analyses.

Noting the distinction between user responsibility repairs made by users, and those made by others but paid for by the responsible users, it is contended that the AAR method of calculation failed to deduct from Account 314 appropriate amounts to cover the latter type. The AAR exclusion for this item was computed by taking 2.73 percent of the Account 314 total, based upon the 1956 study. Analysis of the 1960 Cost Section studies indicate that the deduction for that year would have been about 3.710 percent. Use of the latter percentage produces a reduction in the rates as calculated by the AAR of less than one cent per car day. In the absence of details of the 1956 study, it cannot be found that the deduction made by the AAR did not purport to include all proper elements, nor is the difference in result for past years so substantial as to require the conclusion that the percentage used was necessarily wrong.

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[153] Exh. R-1, Work Table 1, Sheet 2, Line 21, Col. 6, plus Sheet 3, Line 49, Col. 6.

By adding the cost of handling line-responsibility repairs and reimbursements for foreign cars destroyed charged to Account 314 by users, and the cost of handling line responsibility repairs charged to Account 314 by owners, and substracting the cost of reimbursements for foreign cars destroyed, a total amounting to 6.72713 percent of Account 314 for 1960 is obtained.[154] By comparing the exclusion of cost of all handling line responsibility repairs based upon this percentage with the amounts actually excluded in past AAR calculations, differences are shown which indicate the AAR deductions to be too low. The differences applied to the AAR calculations result in lower per diem costs of from 3.6 to 4.0 cents per car day. It is contended that the AAR calculations were in error to this extent on deductions for handling line responsibility costs. The 6.72713 percent includes 3.71 percent discussed in the last preceding paragraph, as well as train yard inspection costs amounting to about 0.229 percent of Account 314. Revisions made herein to the AAR calculations to include 55 percent of inspection costs as ownership responsibility, heretofore discussed, includes an allowance for the latter item. Similarly, inclusion of 2.788 percent of Account 314 to cover user responsibility repairs on home cars disposes of the remainder of this challenge.

While the Summary T-1 costs cover about 2½ percent less cars than those developed by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to Account 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. Summary T-1 for 1960 added the equivalent of

[154] All taken from the Cost Section analysis for 1960. Exh. R-1, Work Table 1, Page 53.

14.7 percent of Account 314 for this item. As heretofore noted, the calculation of this amount is the subject of some criticism. The remainder of the excess of the Summary T-1 calculations arise from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads, on the latter two. The content and method of evaluation of the 1956 and earlier questionnaires relied upon by the AAR are not of record, and it would be futile at this time to attempt a choice between them and the 1960 studies. It appears likely, however, that the 1947 and 1956 AAR studies become increasingly less accurate with the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, etc. In similar fashion, the 1960 studies lose value as they are applied to more distant periods in the past. For the period from 1960 through 1963, during which the $2.88 rate applied, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies. For the periods 1953 through 1956 and 1957 through 1959, when the $2.40 and $2.75 rates were in effect, there is less basis for distinction, but the 1960 studies appear generally more accurate.[155] Subject to the above comments, it is appropriate to give consideration to the end results of both methods in estimating the ownership cost which should be used to establish the fair, just, reasonable, and non-discriminatory rate or rates which should apply throughout the periods in issue.

Testimony by experienced railroad witnesses suggests that the car day divisors employed in the past by the AAR have been overly optimistic. The matter has already

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[155] The studies relied upon by the AAR have been subjected to severe criticism by some parties. While they were not as detailed nor as closely supervised as the 1960 studies, they cannot be rejected in their entirety.

been considered in an earlier section of this report. The divisor based upon the AAR estimate of car utilization for 1960 included 473,083,857 car days used in the Cost Section analysis, plus 14,991,092 car days of foreign inactive cars, 310,119 Canadian and Mexican inactive car days, and 16,363,860 car days of non-per diem cars. In addition, by deducting only 73,093,494 car days for home surplus and bad order cars,[156] there was included in the divisor some 39,200,638 excess car days, for a total of 543,949,566. Since the AAR applied the average surplus and bad order car figure for each year to the total cars at the end of the year, rather than to the average in use during the year, to develop the utilization ratios which were then averaged, its method produces a divisor of about 542,000,000 active car days as the average of conditions during 1960. The Cost Section studies show that the ownership costs of 1,641,200 per diem cars in 1960 should fairly be spread over some 502,715,000 per diem payable days. The ownership costs of 1,685,910 per diem and non-per diem cars used in the AAR calculations therefore, should be spread over a proportionately greater number, i.e., about 516,000,000. These figures suggest that, for 1960, the car day divisor as calculated by AAR methods, was about five percent high. No appreciable change has taken place in the AAR method in the periods under consideration, and it may reasonably be concluded that past divisors were similarly over-estimated.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate cal-

[156] Consisting of home bad order cars, 163,624 (132,597 by 1.234) plus home surplus cars, 36,085, (36,672 by 0.984), multiplied by 366 days. The Cost Section studies indicated a total of home bad order and surplus cars amounting to 112,294,132.

culations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. The evidential limitations in this case require that findings be confined to the average ownership costs over periods of more than one year. While these periods need not coincide with the periods during which the various challenged rates were in effect, the presentation of the evidence renders this the most practicable approach. Summary T-1 calculations have been introduced for years at or near the beginning or end of each such period, as well as for three of the four years of the 1960-1963 period. The three one-year periods chosen by the AAR as a basis for calculation of costs underlying past rate changes are situated, as shown in Table 28 below, generally near the middle of the period covered by a rate in issue. Thus, the twelve months ending June 30, 1956, comprise a period equal to about 30 percent of the time the $2.40 rate was in effect, situated in the latter half thereof. The year 1958 comprises over one-third of the period in which the $2.75 rate was effective and is situated in the middle of that period. The year 1961 covers one-fourth of the time the $2.88 rate was in effect, close to the middle of the period. Charges for depreciation and interest on cars, on an original cost base, show a continuous increase over the span of each period and, lacking better information, these generally centrally located years may be taken as reasonably representative of the average of such charges in each period. More fluctuation appears in the charges for payroll and property taxes, but the departure of the particular years from the average appears not unreasonable. The remaining two major factors, repairs and the car day divisor underwent appreciable fluctuation and can best be considered by use of the average figures for the period, in connection with the other costs of the test years as calculated by the AAR.

TABLE 28

Year	AAR rate for period	Depreciation charge in MM	Interest charge in MM	Taxes in MM	Account 314 in MM	Average for period	Car day** div. in MM	Average for period
/*/ 1953		$163.1	$201.9	$87.1	$631		603.7	
1954					497		581.9	
1955	$2.40				547		569.0	
[1955-56]				100*	559	(av) 552	578.3	579.5
/*/ 1956		176.9	222.5	99	572		587.5	
1957					569		601.6	
[1958]	2.75	196.7		105*	468	518	579.8	576.6
/*/ 1959		210.7	262.3	111.6	516		548.4	
/*/ 1960		214.7	272.5	114	489		540.6	
/*/ [1961]	2.88	219.9	274.4	108.7	437	455	524.4	
/*/ 1962		227.9	281.4	107.6	452			
1963					443			
1964	Multi-Level							

*—Taxes taken from T-1 calculations except where marked with asterisk. Marked figures taken from AAR calculations. In 1961 the AAR employed $102,580,751 as the total of property and payroll taxes.

**—Based on AAR calculation of average active cars as beginning and end of each year.

[ ]—Years for which AAR calculations were made.

/*/—Years for which T-1 calculations were made.

Data contained in the record permits the substitution in a number of the T-1 and AAR calculations of the charges for depreciation of cars based upon reproduction costs in place of those based upon original cost. Similarly, charges for interest on investment in freight cars may be adjusted to reflect an original cost base where necessary. The AAR calculations for 1958 and 1961 do not contain the data necessary to adjust the charges for interest on repair facilities to an original cost base, and Summary T-1 calculations must be relied on for this item, where possible. Summary T-1 calculations based on original costs, and as adjusted to allow charges for depreciation based upon 40 percent of reproduction cost and 60 percent of original cost, are reflected in Table 29, below.

TABLE 29 [1]

Year	T-1	T-1 (ADJ)	AAR Rate
1949	$1.75		$1.75
1951	1.68		1.75
1953	2.12	$2.15	2.00–2.40
1956	1.96	2.02	2.40
1959	2.44	2.53	2.75
1960	2.50	2.58	2.88
1961	2.58	2.67	2.88
1962	2.76	2.86	2.88
1963	2.78	2.86	2.88

(2) *The $2.40 Rate—1953 to 1957.*

This rate, which was in effect from August 1, 1953, to January 1, 1957, was supported by AAR staff calcula-

[1] The figures in this table do not reflect any deduction of a "repair deficiency." Calculations for 1961 and 1962 were introduced only upon an original cost basis. Depreciation charges on a reproduction cost basis for these years were estimated by increasing the original cost based charge in proportion as the 1960 original cost based charge bore to the 1960 adjusted cost based charge. See explanation below in re the $2.88 rate. No data was introduced for 1963. Figures on both the original and reproduction cost base for 1963 represent the application of an estimated 11 percent increase over 1960, as indicated by Cost Section testimony.

tions using cost statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The total 1952 cost as thus computed of 238.73 cents per active car day was rounded to $2.40 for application after August 1, 1953. As heretofore noted, it is no longer necessary to rely upon the 1952 data since the record contains cost calculations for the twelve months ending June 30, 1956.[157]

The AAR calculations for this period, based on ledger value for all capital items, and employing car day divisors of 551,578,104 and 568,450,205 days, produced a daily cost of $2.05399.[158] The average car utilization factor, as computed by the AAR for the years 1954 through 1956, produces an average car day divisor of 584,851,360 car days. Earlier in this report the tendency of the AAR method of developing active car days to produce an inflated figure was discussed. Reducing the indicated average divisor for the three-year period by five percent produces approximately 555,608,792 per diem payable days per year over which the average annual costs for all cars should be spread.

Set forth below are the AAR calculations for 1955-1956, revised in accordance with the principles heretofore discussed. The average of Account 314 figures for 1954-1956 has been adjusted by eliminating the estimated cost of user repairs to home cars, and including the cost of

[157] As reported to the AAR by 89 railroads owning over 98% of total per diem cars.

[158] The AAR divisors were based upon the average car utilization factor for the 20 years, 1936-1955.

inspection of cars.[159] Interest on depreciated car value, interest on repair facilities, and depreciation on repair facilities have been included on the ledger value base, as shown in the AAR calculations. All other miscellaneous costs, including taxes, have been included as reported to the AAR for the purposes of the computation. These reports were made by 89 Class I carriers owning nearly 99 percent of the per diem cars, and the costs reported on this basis have been reduced to a daily figure by use of a divisor which reflects the number of cars covered by the reports. The adjusted amount for Account 314, and the amount allowed for depreciation on freight cars, having been based upon the total of all Class I carriers, have been reduced to a daily figure by a divisor which reflects the greater number of cars involved. Both divisors represent the average utilization for the period 1954-1956, as computed by the AAR, reduced by five percent. Appropriate adjustment of the car repair ratio to reflect the revisions of Account 314, would result in minor revisions of the miscellaneous items, but the evidence is not in sufficient detail to permit these calculations.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation is based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was

[159] Average Account 314 for 1954-1956 was $538,721,648. Deducting 1.46 percent as payment for foreign cars destroyed less salvage, 2.73 percent as labor and material charges and voucher payments for repairs to foreign cars account handling line responsibility, 2.788 percent as user repair costs on home cars, and 45 percent of labor cost of train yard and interchange inspection, and adding 1.24 percent of average Account 314 total to cover switching expense, produces $465,497,200. The labor cost of train yard and interchange inspection was estimated by taking the average freight train car miles for the period 1954-1958, of 30,520,798,000 times the average inspection cost for September 1956 of $3.08 per 1000 car miles.

also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation. Further overstatement results from failure to deduct any salvage value. The allowances for depreciation of cars, based upon reproduction value, together with the amounts allowed for hire of freight cars in the Summary T-1 calculations for 1953 and 1956, total approximately $260,000,000 and $297,000,000, respectively.[160] These latter must be taken as more reliable measures of this charge.

This charge, based upon depreciation enlarged by application of the cost indices to the entire original cost, gives no recognition to the lesser costs arising from financing of car purchases. For the purposes of the present calculation, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[161]

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[160] Hire of freight cars plus recorded depreciation on all freight cars, plus allowance for normalized depreciation on all fully-depreciated cars. Thus, for 1953, from Exh. R-33, page 2-A, $249,707,090 plus ⅓ of 1 percent to allow for normalized depreciation on non-per diem cars, plus $9,431,201 for hire of freight cars. For 1956, from Exh. R-34, page 1, $266,959,333 times 100/96 to include depreciation on non-per diem cars, plus ⅓ of 1 percent to allow for normalized depreciation on non-per diem cars, plus $18,254,405 for hire of freight cars. To be more strictly accurate, the amount for Hire of Freight Cars should be apportioned between depreciation and interest, but the record contains no basis for such a separation. It does not appear that appreciable error results from use of the amount in the fashion shown.

[161] Summary T-1 for 1956, using 40 percent of unit cost of 44.140, and 60 percent of unit cost of 29.249, produces adjusted unit cost of 35.205. Ratio of latter to 44.140 applied to $297,000,000 results in charge of $236,700,000.

TABLE 30

	Item	Amount	Per Day (3)	Comments
1	Car Repair	465,497,200	83.783	Average of Account 314 for 1954-1956, adjusted. (1)
2	Prop. & Payroll Tax.	100,040,023	18.246	(2)
3	Car Depr.	236,700,000	42.602	At 3.08 percent of reproduction value. (1)
4	Int. on Cars	196,167,412	35.779	At 6 percent on depreciated ledger value. (2)
5	Depr. Rep. Fac.	8,717,211	1.590	Based on undepreciated ledger value, as reported. (1)
6	Int. on Rep. Fac.	15,794,417	2.914	At 6 percent on depreciated ledger value. (2)
7	Misc. Main. of Equip. Accts.	43,669,996	7.965	(2)
8	Main. of Rep. Fac.	27,489,127	5.014	(2)
9	General Expense	30,759,352	5.610	(2)
10	Deadhead haul	14,484,188	2.642	(2)
11	Int. on stock of Rep. Materials	3,585,195	0.654	(2)
12	Int. on Working Cap.	3,152,232	0.575	(2)
Total			207.374	

(1) Divisor 555,608,792 per diem payable days, using 1954-1956 average utilization per AAR, less five percent.

(2) Divisor 548,274,756 per diem payable days, using 98.68 percent of the divisor in (1), to reflect the lesser number of cars of the 89 reporting railroads. This percentage represents the ratio on December 31, 1955, of cars owned by the reporting carriers to total cars.

(3) Cost per diem payable day stated in cents.

Cost calculations for 1953 and 1956, using the Summary T-1 formula provided in Form H, were offered in evidence, using both original cost and reproduction cost bases. By substituting 40 percent of the allowance for depreciation on cars at the reproduction cost level and 60 percent of the allowance based on original cost in the calculations based upon original cost, totals of $2.15 and $2.02 per day, respectively, are obtained. Table 28, supra, indicates that, while per diem payable days in 1956 were some 16,000,000 less than 1953, the charges to Account 314 were also nearly $60,000,000 less. Both of the intervening years experienced per diem payable days and charges to Account 314 which were less than either 1953 or 1956. An average rate of $2.08 is indicated by the Summary T-1 calculations for the 1953-1956 period.

The Examiner finds that the just, fair, reasonable and non-discriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from August, 1953, through December, 1956, inclusive, was $2.08.

(3) *The $2.75 Rate—1957 to 1959.*

This rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the twelve months ending June 30, 1956. These indicated a cost for repairs and associated maintenance item of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The total mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was adjusted to reflect 1956 cost increases, resulting in a figure of 276.96 cents, which was rounded to the $2.75 rate. The costs for this period may

now be assessed by reference to the actual experience for the year 1958.

The AAR calculations for 1958, based on reproduction cost both for depreciation of freight cars, and for return on depreciated investment in cars and repair facilities, using divisors of 579,865,344 and 583,499,222 days, produced a daily cost of $2.63801.[162] The average car utilization factor as computed by the AAR for the years 1957 through 1959 produces an average car day divisor of 574,849,036 days. Reducing this indicated average divisor for the three year period by five percent produces approximately 546,106,584 per diem payable days per year over which the average annual costs should be spread.

Set forth below are the AAR calculations for 1958, revised in accordance with the principles heretofore discussed. The average of Account 314 figures for the years 1957-1959 has been used, after adjustment to eliminate the estimated cost of user repairs to home cars, and the inclusion of cost of inspection of cars.[163] Interest on depreciated investment in cars, has been estimated by taking 6 percent of the condition percentage of 55.5 percent of the undepreciated ledger value as of December 31, 1958. Depreciation on repair facilities has been included on the ledger value base, adjusted to reflect changes in the repair ratio due to revisions of Account 314 for 1958.[164]

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[162] This amount reflects the use of 1958 repair costs. The AAR divisors were based upon the average car utilization factor for the 20 years 1939-1958.

[163] Average Account 314 for 1957-1959 was $517,701,585. Deductions and additions as set forth in Footnote 159, supra. The labor cost of train yard and interchange inspection was estimated by taking the average freight train car miles for the period 1956-1958 of 30,562,113,000 times the average inspection cost of $3.50 per 1000 car miles, as of 1958. Account 314 for 1958 was similarly adjusted to provide a basis for correction of the freight car repair ratio used to allocate other items.

[164] All of the miscellaneous items, other than No's. 1, 3, and 4, are affected to some extent by changes in the repair ratio.

Interest on repair facilities has been included at 6 percent of the depreciated reproduction value. As heretofore discussed, the basis for this charge should be the original, or ledger, value, but the record does not contain sufficient data to revise this figure. All other cost items have been included as used by the AAR for 1958, adjusted to reflect the change in the repair ratio. A divisor of 546,106,584 days has been used to reduce the car repair charge to a daily figure, based upon the average utilization for 1957-1959, to conform with the similar base used to calculate the amount. A divisor of 554,324,261 days has been used to reduce all other charges to a daily figure, based upon the average utilization during the year 1958.

The allowance for depreciation on cars used by the AAR was calculated by multiplying the average undepreciated cost on a reproduction base, of $7,887, as of December 31, 1958, by the total of 1,743,484 cars owned or leased on that date, taking 3.09 percent thereof. No deduction was made for salvage value. As has been noted above, where a single average rate is calculated, the method used by the Cost Section appears to furnish a more reliable measure of such charges. Summary T-1 calculations for 1959 and 1960, with depreciation on cars revised to a reproduction cost basis, plus amounts allowed for hire of freight cars, indicate approximate costs of $366,000,000 and $379,000,000, respectively.[165] The comparable figure from the T-1 calculation for 1956 is $297,000,000. The 1959 figure must be taken as the more reliable measure of this charge. As in the last-described calculation, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[166]

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[165] Calculated as described in Footnote No. 160, supra, using Exhibits R-35 and R-36.

[166] Summary T-1 for 1959, using 40 percent of unit cost of 62.545, and 60 percent of unit cost of 41.351, produces adjusted unit cost of 49.828. Ratio of latter to 62.545 applied to $366,000,000 results in charge of $291,580,000.

TABLE 31

	Item	Amount	Per Day(5)	Comments
1	Car Repair	439,840,509	80.542	Average of Account 314 for 1957-1959, adjusted.(1)
2	Prop. & Payroll Tax.	102,743,728	18.535	(2)
3	Car Depr.	291,580,000	52.781	At 3.09 percent of reproduction value.(2)
4	Int. on Cars	239,742,628	43.249	At 6 percent on depreciated ledger value.(2)(3)
5	Depr. Rep. Fac.	8,611,797	1.554	Based on undepreciated ledger value.(2)
6	Int. on Rep. Fac.	40,165,191	7.246	At 6 percent on depreciated reproduction value.(2)(4)
7	Misc. Main. of Equip. Accts.	45,942,162	8.288	(2)
8	Main. of Rep. Fac.	20,450,244	3.689	(2)
9	General Expense	30,000,575	5.412	(2)
10	Deadhead Haul	11,020,858	1.988	(2)
11	Int. on stock of Rep. Materials	2,727,935	0.492	(2)
12	Int. on Working Cap.	2,629,663	0.474	(2)
Total			224.250	

(1) Divisor 546,106,584 per diem payable days, using 1957-1959 average utilization per AAR, less five percent.

(2) Divisor 554,324,261 per diem payable days, based upon 1958 average per AAR, less five percent.

(3) Ledger value, undepreciated, December 31, 1958, was reported as $7,199,468,315. Using reported condition percentage of 55.5 percent produces a depreciated ledger value of $3,995,710,465.

(4) The record does not permit revision of this figure to an original cost basis.

(5) Cost per diem payable day stated in cents.

The T-1 calculations from Form H, based upon data for the year 1959, and adjusted to reflect charges of 40 percent and 60 percent, respectively, on the reproduction and original cost bases for depreciation on freight cars, indicate a cost per per diem payable day of $2.53. This compares with the cost, produced by use of the same method, of $2.02 for the year 1956, and a mean of about $2.27. Table 28 indicates that 1957 cost experience was generally similar to 1956, with somewhat lower repair costs and improved utilization, suggesting a possible lower daily cost per car. 1958, while experiencing some 22,000,000 less per diem payable days, also shows a reduction of over $100,000,000 in repair costs. The increases in the daily cost per car indicated by the T-1 calculation for 1959 is explained to some extent by the increase of some $48,000,000 in repair costs during that year, together with a drop of some 31,000,000 in the per diem payable days over which the costs were spread.

Upon consideration of the available evidence, the Examiner finds that the just, fair, reasonable and non-discriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from January, 1957, through November, 1959, inclusive, was $2.25.

(4) *The $2.88 Rate—1960 to 1964.*

This rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A five year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in freight cars and repair facilities, based on reproduction costs, was 85.737 cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893

cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

As with the prior rates, it is now possible to measure this rate against costs for a portion of the period during which it was in effect. Calculations by the AAR staff underlying the multi-level rates include an analysis of costs for the calendar year 1961, covering one-fourth of the time the $2.88 rate applied. In addition, the Summary T-1 calculation by the Cost Section, based upon the 1960 special studies, provides a measure of costs for that year. Summary T-1 calculations, based upon the Form H formula, were also introduced for the years 1961 and 1962.

The cost per car per day is directly related to car utilization, or the number of per diem payable days over which the total costs for the year must be spread. This information is not available for 1963 but Summary T-1 estimates through 1962 can be obtained, based upon 1960 ratios. These in millions of car days, are 502.7, 475.6, and 458.7.[167] Table 28 indicates some reduction in property and payroll taxes during these years. Account 314 repair costs dropped some 52 million dollars in 1961, rose 15 million dollars in 1962, then dropped about 9 million in 1963. Charges to depreciation and interest on cars rose during the period. As computed by the T-1 method, aggregate ownership costs for 1960 were 1,256 million dollars, for 1961 the estimate is 1,226 million, and for 1962 the estimate is 1,269 million. Cost reductions in 1961 were more than counterbalanced by the reduction in per diem payable days available to absorb the total.

The cost index used to estimate the reproduction costs of freight cars did not change between 1962 and 1963, and experienced a relatively small increase between 1961 and 1962. As shown in Table 16, 1963 Account 314 re-

[167] Aggregate ownership costs divided by per diem unit cost or, active car days of per diem cars multiplied by 1.06263.

pairs were slightly less than in 1962, and was about $22,000,000 less than the four year average. These factors indicate a general similarity to 1962 conditions.

The AAR calculations for 1961, based upon reproduction cost both for depreciation of freight cars, and for return on depreciated investment in cars and repair facilities, using divisors of 543,856,972 and 553,040,655 days, produced a daily cost of $2.72892. Per diem payable days for 1961, as calculated by use of the Form H, Summary T-1 method, are approximately 475,547,000. The AAR calculations cover about 2½ percent more cars than the Summary T-1 figures and, as noted above, would have required the use of some 516,000,000 days in 1960. Applying the ratio of Summary T-1 per diem payable days in 1960 to this figure to 475,547,000 produces an estimated per diem payable days for 1961 of about 488,000,000 for application to the AAR costs.

Set forth below are the AAR calculations for 1961, revised in accordance with the principles heretofore discussed. The Account 314 figure for the year 1961 has been used, after adjustment as described with reference to the earlier rates. Interest on depreciated investment in cars has been estimated by taking the total amount allowed in the 1961 Summary T-1 calculation, together with the cost per day computed therein. Interest on car repair facilities has been similarly treated, in order to provide an original cost base for the two items.[168] Other items, apart from depreciation on cars, have been included in the same fashion as described with reference to the 1958 calculation. A divisor of 488,000,000 days has been used to reduce all charges, other than interest on cars and repair facilities, to a daily figure, based upon the estimated average utilization during the year 1961.

While Summary T-1 calculations of depreciation on a reproduction cost base were not offered in evidence for 1961, the depreciation charge used by the AAR, $396,-

[168] This results in an allowance of 6.62 percent interest on these items.

434,812, appears reasonable in relation to the Summary T-1 figures for 1959 and 1960, supra. As before, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[160]

[160] Summary T-1 for 1960, using 40 percent of depreciation charge on original cost, and 60 percent of depreciation charge on reproduction cost, produces adjusted depreciation charge of $255,238,138. Ratio of latter to charge on reproduction cost base applied to $598,434,812 results in charge of $320,057,000.

TABLE 32

Item		Amount	Per Day (2)	Comments
1	Car Repair	366,965,749	75.197	Account 314 for 1961, adjusted. (1)
2	Prop. & Payroll Tax	101,858,855	20.877	(1)
3	Car Depr.	321,057,000	65.786	At 7.86 percent of reproduction value. (1)
4	Int. on Cars	274,381,208	61.595	At 6.62 percent on depreciated ledger value.
5	Depr. Rep. Fac.	8,301,208	1.701	Based on undepreciated ledger value. (1)
6	Int. on Rep. Fac.	11,369,077	2.329	At 6.62 percent on depreciated ledger value.
7	Misc. Main of Equip. Accts.	50,145,801	10.317	(1)
8	Main of Rep. Fac.	18,451,321	3.781	(1)
9	Accrual Expense	30,924,888	6.337	(1)
10	Deadhead Haul	10,352,796	2.121	(1)
11	Int. on stock of Rep. Materials	2,502,571	0.513	(1)
12	Int. on Working Cap.	2,488,184	0.509	(1)
Total			250.930	

(1) Prime Assumptions per diem payable days.

The Summary T-1 calculation for the year 1960, adjusted to reflect depreciation on freight cars, based 40 percent on reproduction cost and 60 percent on original cost, indicates a cost per diem payable day of $2.58. No similar T-1 calculations are available for subsequent years but approximations may be obtained by increasing the 1961 and 1962 Form H, Summary T-1 calculations for depreciation on cars in proportion as the 1960 adjusted depreciation cost bears to the 1960 original cost based figure. The costs thus indicated are $2.67 and $2.86, respectively. See Table 33, below.

TABLE 33

SUMMARY T-1 COSTS

		1960 (2)	1961 (3)	1962 (4)
1	Car Repairs	116,113	114,025	122,240
2	Depr. on Cars	50,772 (5)	54,972 (1)	59,193 (1)
3	Depr. on Fac.	1,596	1,676	1,736
4	Prop. Taxes	17,102	17,383	17,401
5	Payroll Taxes	5,597	5,486	6,488
6	Int. on Cars	54,200	57,692	61,355
7	Int. on Fac.	2,286	2,433	2,508
8	Hire of Cars	9,733	12,367	15,933
9	Int. on Wk. Cap.	0,570	0,584	0,627
Total		257,975	266,618	285,485

(1) Estimated by use of the ratio of 1960 depreciation on original cost base to 1960 depreciation on adjusted cost base.

(2) From Exhibit H-1.

(3) From Exhibit H-245.

(4) From Exhibit H-246.

(5) Using 60 percent of 1960 depreciation charge on original cost base and 40 percent of 1960 depreciation charge on replacement cost base.

The difference in the estimated cost per car day for 1961, as between the AAR and Summary T-1 methods appears to result primarily from use by the AAR of ratios produced by the 1947 and 1956 studies, as compared with the use of the 1960 studies, and the Summary T-1 analysis. Some of the details have already been mentioned. The ratios and apportionments used in the T-1 formula are more recent, and are the product of a carefully designed study intended to develop the type of costs here in issue. It is found that the results produced by the Summary T-1 calculations are the more reliable for use in determining the ownership costs during the 1960-1964 period. The average of the costs for the years 1960-1962 inclusive is approximately $2.70. To the extent that data is available for 1963, it indicates conditions similar to 1962. The four year average, taking the 1963 daily cost at $2.86, as in 1962, is $2.74. In the absence of more precise data as to the costs for the entire period, and upon consideration of the available evidence, the Examiner finds that the just, fair, reasonable and nondiscriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from December, 1959, through December, 1963, inclusive, was $2.74.[170]

(5) *Docket 31358 Defendants.*

As heretofore observed, the defendants having a present interest in this case are entitled to separate findings

[170] At an earlier stage of these proceedings there was some controversy with respect to an alleged "lag" in the per diem rates. It was asserted that since rates were established at the cost level of the year made effective, and since they remained thereafter at that level until the next increase while costs were rising in the meantime, they lagged behind actual costs and produced less than compensation. In view of the findings herein, this matter requires no further consideration.

as to their individual liabilities based upon that method of per diem cost calculation which most fairly distribute the ownership burden. Distribution of the burden among users by allocation of portions to time and mileage is designed to produce more equitable sharing thereof but, to accomplish this purpose, must fairly reflect the individual situation of each user. Evidence was offered of Summary MT-2 calculations showing the average rate on this basis for all carriers. The 1960 studies show that per diem cars experience more line-haul mileage on foreign lines than on owners' lines. There Summary MT-2 calculations reflect this greater usage in a higher cost chargeable to users than is produced by calculations which distribute the costs on a time-only basis. Thus, the Summary T-1 average cost for all railroads in 1960 was $2.50, compared to the Summary MT-2 figure of $2.77. The latter figure is more equitable to car owners, since it takes into account, on an overall basis, the fact that foreign lines made greater use of the cars, on a mileage basis. It does not, however, fairly distribute the burden among the users.

As computed by the Cost Section, the costs applicable to different carriers on the MT-2 basis varied from $1.55 to $5.66 per day in 1960 for 90 Class I roads. A substantial number are shown to have Summary MT-2 costs lower than the $2.88 average for this group. Of 72 Class II roads, 55 had lower MT-2 costs than the average for the group. Use of a flat cost figure applicable to all users, which averages out all these differences, largely defeats the purpose of the time-mileage allocations. It imposes unreasonably high charges upon users having low average daily distances for foreign cars, and would apparently produce a distribution no more equitable than one based solely on time.

Adjustment of ownership costs for past years to reflect a time-mileage distribution, based on 1960 data, requires the assumption that the relationships shown in 1960 fairly represent conditions existing during the prior years. The primary factors involved are the ratios of each carriers MT-2 cost for 1960 to the calculated cost for all carriers in that year. These depend, in large part, upon the similar relationships of line-haul mileages of foreign cars and per diem days paid for. Evidence offered by the Boston and Maine indicates that a substantial consistency has prevailed with respect to the relationship of per diem payable by the Class I defendants to the total payable by all Class I carriers during the years in issue. While the record is not as satisfactory as might be desired, Summary MT-1 and MT-2 calculations for 1960 demonstrate that the defendants should have their individual situations considered. Adjustment of the average cost of all carriers for past years to reflect the mileage factor for these carriers can be accomplished by use of relationships indicated in the 1960 studies. The results, while of limited accuracy, are found to produce a distribution of costs which more nearly measures the share of ownership burden fairly assignable to the defendants than is obtained by use of average costs on either a time only or time-mileage basis.

Set forth below are the calculations of charges which would, on the above-described basis, fairly assess against the defendants their rateable proportion of the ownership burden for the past periods here in issue. In Table 34 the 1960 cost per line-haul mile has been developed by use of the Summary MT-1 method, using cost bases and time-mileage apportionments, however, consistent with the findings herein. The cost per active car day also has been computed based on this method. Following the Summary MT-2 analysis, the cost per line haul mile has been

multiplied by the 1960 line haul mileage of foreign cars for each defendant, and the total divided by the per diem days paid for. The time cost has been developed by dividing the cost per active car day by the factor shown in Exhibit R-1, Summary MT-2, Column 10. The resulting daily cost for each defendant has been divided by the 1960 daily average cost for all railroads for 1960, based upon the Summary T-1 method, adjusted to reflect allowance of higher depreciation, of $2.58, as shown in Table 33. The resulting relationships have been applied to the costs developed on a similar time only basis heretofore found to be reasonable for each of the periods during which the challenged rates were in effect. The results are summarized in Table 35.

Upon consideration of the available evidence the Examiner finds that the just, fair, reasonable and non-discriminatory rates proper as a daily charge to each of the defendants in Docket 31358 for the use of foreign per diem freight cars in and during each and every month from August, 1953, through December, 1963, inclusive, are those shown in Table 35.

TABLE 34

MT-1 DISTRIBUTION OF 1960 COSTS

Item	Total	Mileage	Time
1 Repairs	583,715,117[1]	291,857,558	291,857,558
2 Depr. on Cars	255,238,138[2]	102,095,255	153,142,883
3 Depr. Rep. Fac.	8,023,021		8,023,021
4 Prop. Taxes-Cars	82,153,074		82,153,074
5 Prop. Taxes-Rep. Fac.	3,824,341		3,824,341
6 Payroll Taxes	28,140,156		28,140,156
7 Interest on Cars	272,469,259		272,469,259
8 Interest on Rep. Fac.	11,489,897		11,489,897
9 Hire of Cars	48,929,073[3]	9,242,911	39,686,162
10 Interest on Wk. Cap.	2,896,316		2,896,316
Total		$402,195,724	893,682,667
Per Line Haul Mile		1.861 cents[4]	
Per Active Car Day			$1.889[5]

(1) Separated 50% each to time and mileage—See Section VIII of this report.

(2) Based on 40% reproduction and 60% original cost—See Section VII; Separated 40% to mileage and 60% to time—See Section VIII of this report.

(3) This item is related to depreciation and interest on cars and has been separated 19.3% to mileage and 80.7% to time as the ratio shown for the totals of these items, as separated.

(4) Using as a divisor 21,676,209,267 line haul miles. See Exhibit R-1, Schedule 3, Sheet 1, Line 12, Column 6.

(5) Using as a divisor 473,083,857 active car days. See Exhibit R-1, Summary MT-1, Sheet 1, Line 17, Column 3.

TABLE 35

RATES REFLECTING TIME-MILEAGE SEPARATION OF COSTS.

Defendant	Ratio(1)	8/1953-12/1956(9)	1/1957-11/1959(9)	12/1959-12/1963(9)
B&M	1.062(2)	$2.21	$2.39	$2.91
L.I.	0.744(3)	$1.55	$1.67	$2.04
N.Y.N.H.&H.	0.732(4)	$1.52	$1.65	$2.01
Rutland	1.116(5)	$2.32	$2.51	$3.06
N.J. & N.Y.	0.768(6)	$1.60	$1.73	$2.10
St. J. & L. C.	1.000(7)	$2.08	$2.25	$2.74

(1) Indicated rates—Ratio for each carrier in 1960 applied to daily charge heretofore found reasonable on a time-only basis for each period; $2.08, $2.25, and $2.74, respectively.

(2) B&M ratio—97,411,439 line haul miles in 1960 times .01861 divided by 1,982,885 per diem days paid for, plus $1.889 divided by factor of 1.035 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(3) Long Island ratio—3,288,935 line haul miles in 1960 times .01861 divided by 733,414 per diem days paid for, plus $1.889 divided by factor of 1.030 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(4) N.Y.N.H.&H. ratio—98,690,038 line haul miles in 1960 times .01861 divided by 3,019,757 per diem days paid for, plus $1.889 divided by factor of 1.037 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(5) Rutland ratio—5,941,657 line haul miles in 1960 times .01861 divided by 106,626 per diem days paid for, plus $1.889 divided by factor of 1.024 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(6) N.J. & N.Y. ratio—194,285 line haul miles in 1960 times .01861 divided by 39,510 per diem days paid for, plus $1.889 divided by factor of 1.000 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(7) St. J.&L.C. ratio—1,320,107 line haul miles in 1960 times .01861 divided by 30,867 per diem days paid for, plus $1.889 divided by factor of 1.054 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(8) Line haul car miles of foreign cars taken from Exhibit R-1, Schedule 4, Col. 4, except for Class II defendants. Official notice of comparable data for the latter (N.Y. & N.J. R.R. and St. J. & L.C. R.R) contained in Cost Section supporting documents has been taken

(9) Rate per day in dollars and cents.

(6) *The Multi-Level Rates—January 1, 1964.*

The rates for the several brackets under the new multi-level system are supported by an AAR study which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing three percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking six percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account 314 repair costs to be anticipated were estimated by using the average of such costs for the five year period, 1957-1961, and a car utilization factor of 94.87, or 335.33 days, was assumed, based upon the average of the twenty-year period, 1942 through 1961. The 1961 data used by the AAR, together with such information as can be derived from the 1960 Summary T-1 calculations, and the Form H. Summary T-1 calculations for 1961 and 1962, provide the basis of record for findings with respect to the period since January, 1964.

Mention has already been made of the calculations by the Cost Section based upon the 1960 studies, separated by car value. Like the AAR calculations these assumed a constant cost per car for all items other than depreciation and interest on cars, and for convenience, em-

ployed the same value brackets. In connection with the development of costs on this basis, the methods used were similar to those employed in the original T-1 calculations, except that the cars were grouped, valued, their depreciated value determined by use of a percent of cost new, and regrouping then accomplished on the depreciated basis. Reproduction value, depreciated and undepreciated, was also calculated using the cost index heretofore described. Active per diem car days were distributed among the brackets on the basis of percentage distribution of the number of owned cars in the per diem fleet. The cost per active car day in each bracket was divided by the ratio of foreign cars to active foreign cars taken from Summary MT-2 to develop the per diem unit cost.

Set forth below are the amounts calculated by the Cost Section as the average original cost, depreciated original cost, and reproduction cost of cars in each value bracket, together with the calculated per diem costs on both original and reproduction cost bases.[171] An appreciable reduction in the rate of increase in the cost index, heretofore described, took place after 1959. In 1960 the Account 53 index was 619, an increase of but seven points over 1959, compared with an average of nearly 27 points per year over the preceding nine years. In 1961 the index was 624, and in 1962 and 1963 it remained at 627. Form H, Summary T-1 calculations for 1961 and 1962 indicate a continuing reduction in the total number of cars in the per diem fleet, but a fairly constant number of per diem payable days per car, 297 in 1961 and 296 in 1962, compared with 306 in 1960. Repair and maintenance costs per car, as heretofore noted,[172] dropped to about $372

[171] The brackets used are those in effect prior to April 1, 1965. No calculations are of record with respect to the brackets and rates which became effective on that date. Data shown is taken from Exhibit R-80.

[172] See Footnote No. 88

per car in 1961, then rose to about $398 per car in 1962, compared with about $389 in 1960. It appears reasonable to employ the average figure of 300 per diem payable days, and a repair cost of about $390.00 in measuring the costs to be anticipated in 1964.

Reference to Table 36, below, shows the average original cost of cars in AAR Bracket No. 1, as computed by the Cost Section, was $2,280. On a reproduction value basis, the average was $7,657, an increase of some 336 percent. This approximates the relationship of the 1936 index of 182 to the 1960 index of 619. Similarly, for cars in AAR Bracket No. 2, the increase over original cost due to use of reproduction value was some 189 percent, approximately the relationship of the 1947 index of 320 to the 1960 index. Table 14 indicates that capital costs per thousand for cars of these respective average ages are approximately $70.20 and $75.34. Employing these figures, the capital costs for the average original cost cars in AAR Brackets 1 and 2 are $160.05 and $314.70, respectively. Adding a repair and maintenance cost of $390.00 and dividing by 300 per diem payable days produces costs of about $1.83 and $2.35 per car per day. These costs, as well as costs similarly calculated for the other brackets, are shown in the last column in Table 36.

TABLE 36

Val. Br.	Av. Orig. Cost	Av. Reproduction Cost	Av. Depreciated Orig. Cost	T-1 Orig. Cost Base	T-1 Repro. Cost Base	AAR Rate	Table 14 Cost
1	2,280	7,657	625	187	269	216	183
2	4,177	7,905	2,639	245	325	279	235
3	8,102	9,484	7,133	372	411	358	357
4	12,131	12,452	11,599	500	512	450	479
5	17,322	17,156	17,115	660	659	615	646
6	23,364	23,715	22,866	831	842	774	821

Measured by either Summary T-1 cost, or by those calculated as just described, the rates in Brackets 3 through 6 could not be found to exceed reasonable compensation to owners. Summary T-1 costs, based upon original costs only, indicate an excess of compensation with respect to the first two brackets, particularly since they include depreciation and interest on fully depreciated cars. As of January 1, 1962, nearly 81 percent of all per diem cars were in these two brackets. They are necessarily the brackets whose costs are most affected by the substantial number of cars over 30 years of age.[173] While allowance for the effects of inflation on the recovery of invested capital is appropriate, there is no basis in a multi-level system for allowing such recovery in any amount on cars which have already been fully depreciated. While the detailed data necessary to make such adjustments to the Summary T-1 costs is not of record, it is apparent that the result would be to lower the indicated costs on both the original and reproduction cost basis. At the same time, the allowance for depreciation based in part on reproduction costs would have the effect of raising the level of these costs. The rates shown in the last column of Table 34 reflect the application of these principles, based upon average conditions shown for the years 1960 through 1962, and indicate that the rates of $2.16 and $2.79 for cars in Brackets No. 1 and 2 were and are higher than reasonable compensation. Rates in these brackets sufficient to compensate car owners for the burden of owner-

[173] Approximately 25 percent of the cars in these two brackets fall into the over-30 year category. They numbered, on January 1, 1962, some 324,729, or 20.21 percent of all per diem cars. Not only was depreciation on such cars included, but it was based on their full reproduction value without allowance for salvage value.

Value Brackets 1 and 2. Compensatory rates for cars in Value Brackets 1 and 2 would not exceed $1.83 and $2.35, respectively.

The Examiner further finds that just and reasonable compensation for the use of freight cars in interchange service will result from the calculation and assessment of charges in a manner not inconsistent from that set forth in this report. The revision of rate tables and institution of appropriate systems to account for time and mileage of cars will necessarily require some period of time, during which the present multi-level system may be employed, subject to findings as to the reasonableness of the rates presently provided under that system. Respondents will be required to advise the Commission within sixty days of the effective date of the final order in this case of the earliest date a rate system not inconsistent with the findings and conclusions herein can be made effective. Requested findings not reflected in the findings and conclusions herein have been considered and found not justified.

Docket No. 31358

It is the Opinion of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that the proceeding in Docket 31358 be, and it is hereby, discontinued.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. Neil Garson
Secretary

(Seal)

Docket No. 33145

It is the ORDER of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; that the respondents in Docket 33145 be and they are hereby ordered to promptly take appropriate steps pursuant to the provisions of the per diem agreement (Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage Agreement) to revise the present multi-level rates, and the rules, regulations and practices pertaining thereto, so as to eliminate the unreasonableness heretofore found to exist, and in such fashion as to be not inconsistent with the findings and conclusions in the attached report, and to advise the Interstate Commerce Commission not more than sixty days from the effective date of this order of the earliest date upon which such revision can be placed in effect, and thereafter to place and maintain in effect the aforesaid revised system and rates, and that this order shall continue in force until further order of the Commission.

It is further ordered that the presently effective multi-level rates may be continued in use until the above-mentioned revisions can be accomplished, subject to findings herein as to the reasonableness of rates in Value Brackets 1 and 2.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. NEIL GARSON
Secretary

(SEAL)

Docket No. 34405

It is the Opinion of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that the complaint in Docket 34405, except to the extent to which the relief sought has been granted by order in Docket 33145, be, and it is hereby, dismissed.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. Neil Garson
Secretary

(SEAL)

Appendix A

Definitions of Terms

1. Per Diem Cars:

Freight train cars owned or held under lease arrangement by railroads whose interline rental is settled on a per diem basis under the Code of Per Diem Rules or would be so settled if used by another railroad.

2. Mileage (also Other Non-Per Diem Cars):

Includes all freight train cars other than per diem cars, such as cabooses, cars whose charges are settled on a mileage basis cars, not meeting interchange standards, etc.

3. Home Cars:

Per diem cars which are located on the tracks of the railroad owning same or having control thereof pursuant to a lease arrangement.

4. Foreign Cars:

Per diem cars which are not located on the tracks of the railroad owning same or having control thereof pursuant to a lease arrangement.

5. Surplus Cars:

Per diem cars in operating condition but idle, and for which ladings are not available. The Cost Section studies defined cars in this group as those found to have been empty and idle for a period of 48 hours.

6. Bad Order Cars:

Per diem cars which are not in operating condition and available for active service due to the need for repairs.

7. Car Day Division:

The figure which represents the total days over which the per diem costs attributable to time are to be spread. It is expressed both as a total figure applicable to all costs, and as a figure per car, for application to the costs on a per car basis.

8. Ownership Repairs:

Also referred to as owner responsibility repairs. Repairs to per diem cars necessitated by ordinary wear and tear in fair service which, in the case of foreign cars, is ordinarily billable to the owner. Includes repairs of this description where the circumstances are such, pursuant to the Interchange Rules, that no bill would be made to the owner. Repairs classed as ownership responsibility may be made by owners on their own cars or by users on foreign cars, regardless of where the incident which may have made it necessary occurred.

9. User Repairs:

Also referred to as user responsibility repairs. Repairs to per diem cars made necessary by damage due to unfair usage or improper protection by the using line. This type of repair may be the actual responsibility of either a user of a foreign car, or an owner with respect to its own car. Such repairs may be made by the owner or user upon whose line the damage occurred, or by another user to whom the car is delivered. In the latter case, the repairing line bills the responsible line or the owner. If the latter, it then bills the responsible line. User responsibility repairs should not be included in the cost calculations supporting per diem rates.

10. Net Per Diem Creditor:

A railroad which, on an annual basis, receives a greater amount of revenue from the use of its cars by other railroads than the debt which it incurs by its use of the car of other railroads.

11. Net Per Diem Debtor:

A railroad which, on an annual basis, receives a lesser amount of revenue from the use of its cars by other railroads than the debt which it incurs by its use of the cars of other railroads.

12. Predominantly Originating Carrier:

A railroad which originates and sends off its lines a substantially greater number of freight car loads than it receives and delivers to destinations on its lines. Such carriers generally occupy a per diem creditor position, due to this characteristic of their service.

13. Predominately Terminating Carrier:

A railroad which receives and delivers to destinations on its line a substantially greater number of freight car loads than it originates and sends off line. Such carriers generally occupy a per diem debtor position, due to this characteristic of their service.

Appendix B

Rail Form H

Summary 1-1 of this form combines certain totals from Schedules 1 and 2, to develop in Column 3 the aggregate ownership costs for all per diem cars and in the per diem days paid for by all U.S. railroads. Since it was originally designed to develop a uniform cost for all cars, regardless of value, it includes certain investment costs which should be deleted. These are Line 2, Depreciation of freight train cars, Line 4, Property taxes allocated to freight train cars, Line 7, Return on investment in freight train cars and Line 9, Hire of Freight Cars. Line 11 will then contain the items of repair and maintenance which, based upon the information in this record, should be spread over the costs of all per diem cars equally. As has been noted, further studies may demonstrate a need for separate calculation of these costs between type, age, and or value of cars. Lines 12 and 13, and Footnote 2 to this Summary, have to do with the "repair deficiency" which has already been found not appropriate as a deduction from the ownership costs. Lines 14 through 19 provide a method for calculation of the per diem days paid for, based upon the 1960 data. This figure is related to the problem of distribution of the ownership costs and employs data compiled and summarized in Schedule 2, hereinafter described.

Repair and maintenance costs, after deletion of the items mentioned above, are as follows:

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Appendix C

Where an owner finances a substantial part of the
of cars, and is required to meet annual payments spr
over a period of fifteen years, contribution from car u
based upon spreading costs over a period of 30 y
requires the owner to carry the difference between
payments on the obligation and the annual contribu
by users. This is in effect, additional contribution by
owner to the capital cost of the car, and it should rec
interest thereon until repaid. This payment should
accomplished during the second fifteen years of the
year period by the excess of per diem charges over
then reduced capital costs. The adequacy of the calc
tions herein recommended to accomplish this purpose
indicated by the following tables.

Table A shows the charges, taken from Table 1 in
text, necessary to meet costs per $1,000 in a fifteen y
period where 80 percent of the cost of the car is finan
at 4½ percent. In Column 2 is shown costs on the sa
basis but spread over a thirty year period, taken fr
Table 4. Column 3 shows the amount of difference
each year which the owner must carry. The interest
6.62 percent and the cumulative totals are shown in
remaining columns. This table indicates that rates ba
upon costs shown in Table 4 would be somewhat less th
necessary to compensate car owners under the assum
conditions.

Table B is similarly constructed but is based upon
assumed 40 percent payment by the owner of the origi
cost, and financing of the remaining 60 percent. T
figures in Columns 1 and 2 were constructed in simi
fashion to those in Tables 1 and 4 of the text. This ta
indicates that rates based upon costs shown in Colum

would be very slightly less than necessary to compensate car owners under the assumed conditions.

Although occasional car acquisitions are made with cash payments exceeding 40 percent of the cost, the great majority involve lesser amounts. Table B indicates that rates constructed in relation to the figures in Column 2 would be adequate to compensate owners for the considered capital items in all instances of cash down payments under 40 percent of the original cost. Calculations which, as in this report, allow for the impact of inflation with respect to 40 percent of the original cost, with interest at 6.62 percent on the unreturned balance, produce overcompensation in varying degrees where cars are purchased at lower down payments. Giving consideration, however, to the impact of losses in purchasing power of the additional dollars invested by reason of carrying the above-described differences, and the most common, 20 percent, payment, the return is found to be the most nearly equitable shown by the record. This is indicated by Table C, below, in which the 15 year burden of an 80 percent financed purchase is compared with costs calculated on a 30 year basis, assuming a 40 percent payment and 60 percent financing.

Table A

Twenty Percent Cash—Eighty Percent Financed

	1	2	3	4	5	6	7
	15 Yr. Burden[1]	30 Yr. Spread[2]	Carried Amt.	Cuml. Int.	Cuml. Total	Return of Capital	Balance Carried
1	119.09	89.95	29.14	1.93	31.07		
2	115.82	88.31	27.51	3.88	62.46		
3	112.55	86.68	25.87	5.85	94.18		
4	109.27	85.04	24.23	7.83	126.14		
5	106.01	83.41	22.60	9.85	158.59		
6	102.72	81.78	20.94	11.88	191.41		
7	99.43	80.15	19.28	13.95	224.64		
8	96.16	78.51	17.65	16.04	258.33		
9	92.89	76.88	16.01	18.16	292.50		
10	89.61	75.24	14.37	20.31	327.18		
11	86.34	73.61	12.73	22.50	362.41		
12	83.07	71.97	11.10	24.73	398.24		
13	79.80	70.35	9.45	26.99	434.68		
14	76.48	68.71	7.77	29.29	471.74		
15	73.26	67.09	6.17	31.64	509.55		
16	7.78	65.42	(57.64)	33.73	509.55	23.91	485.64
17	"	63.83	(56.05)	32.15	485.64	23.90	461.74
18	"	62.19	(54.41)	30.57	461.74	23.84	437.90
19	"	60.57	(52.79)	28.99	437.90	23.80	414.10
20	"	58.93	(51.15)	27.41	414.10	23.74	390.36
21	"	57.30	(49.52)	25.84	390.36	23.68	366.68
22	"	55.66	(47.88)	24.27	366.68	23.61	343.07
23	"	54.03	(46.25)	22.71	343.07	23.54	319.53
24	"	52.39	(44.61)	21.15	319.53	23.46	296.07
25	"	50.76	(42.98)	19.60	296.07	23.38	272.69
26	"	49.12	(41.34)	18.05	272.69	23.29	249.40
27	"	47.49	(39.71)	16.51	249.40	23.20	226.20
28	"	45.85	(38.07)	14.97	226.20	23.10	203.10
29	"	44.22	(36.44)	13.45	203.10	22.99	180.11
30	"	42.58	(34.80)	11.92	180.11	22.88	157.23

[1]—From Table 1.
[2]—From Table 4.

Table B

Forty Percent Cash—Sixty Percent Financed

	1	2	3	4	5	6	7
	15 Yr. Burden	30 Yr. Spread	Carried Amt.	Cuml. Int.	Cuml. Total	Return of Capital	Balance Carried
1	123.20	94.13	29.07	1.92	30.99		
2	120.17	92.62	27.55	3.88	62.42		
3	117.16	91.11	26.05	5.86	94.33		
4	114.14	89.59	24.55	7.87	126.75		
5	111.11	88.08	23.03	9.92	159.70		
6	108.09	86.58	21.51	12.00	193.21		
7	105.07	85.06	20.01	14.12	227.34		
8	102.05	83.55	18.50	16.27	262.11		
9	99.03	82.04	16.99	18.48	297.58		
10	96.01	80.52	15.49	20.73	333.80		
11	92.98	79.01	13.97	23.02	370.79		
12	89.97	77.50	12.47	25.37	408.63		
13	86.95	75.99	10.96	27.78	447.37		
14	83.92	74.48	9.44	30.24	487.05		
15	80.89	72.98	7.91	32.77	527.73		
16	7.78	71.47	(63.69)	34.94	527.73	28.75	498.98
17	"	69.96	(62.18)	33.03	498.98	29.15	469.83
18	"	68.45	(60.67)	31.10	469.83	29.57	440.26
19	"	66.94	(59.16)	29.15	440.26	30.01	410.25
20	"	65.43	(57.65)	27.16	410.25	30.49	379.76
21	"	63.92	(56.14)	25.14	379.76	31.00	348.76
22	"	62.40	(54.62)	23.09	348.76	31.53	317.23
23	"	60.89	(53.11)	21.00	317.23	32.11	285.12
24	"	59.38	(51.60)	18.87	285.12	32.73	252.39
25	"	57.86	(50.08)	16.71	252.39	33.37	219.02
26	"	56.35	(48.57)	14.50	219.02	34.07	184.95
27	"	54.84	(47.06)	12.24	184.95	34.82	150.13
28	"	53.32	(45.54)	9.94	150.13	35.60	114.53
29	"	51.81	(44.03)	7.58	114.53	36.45	78.08
30	"	50.30	(42.52)	5.17	78.08	37.35	40.73

Table C

Comparison—Twenty-Forty Percent Calculations

	1	2	3	4	5	6	7
	20 Percent 15 Yr. Burden[1]	40 Percent 30 Yr. Spread[2]	Carried Amt.	Cuml. Int.	Cuml. Total	Return of Captial	Balance Carried
1	119.09	94.13	24.96	1.65	26.61		
2	115.82	92.62	23.20	3.30	53.11		
3	112.55	91.11	21.44	4.94	79.49		
4	109.27	89.59	19.68	6.57	105.74		
5	106.01	88.08	17.93	8.19	131.86		
6	102.72	86.58	16.14	9.80	157.80		
7	99.43	85.06	14.37	11.40	183.57		
8	96.16	83.55	12.61	12.99	209.17		
9	92.89	82.04	10.85	14.57	234.59		
10	89.61	80.52	9.09	16.13	259.81		
11	86.34	79.01	7.33	17.68	284.82		
12	83.07	77.50	5.57	19.22	309.61		
13	79.80	75.99	3.81	20.75	334.17		
14	76.48	74.48	2.00	22.25	358.42		
15	73.26	72.98	0.28	23.75	382.45		
16	7.78	71.47	(63.69)	25.32	382.45	38.37	344.08
17	"	69.96	(62.18)	22.78	344.08	39.40	304.68
18	"	68.45	(60.67)	20.17	304.68	40.50	264.18
19	"	66.94	(59.16)	17.49	264.18	41.67	222.51
20	"	65.43	(57.65)	14.73	222.51	42.92	179.59
21	"	63.92	(56.14)	11.89	179.59	44.25	135.34
22	"	62.40	(54.62)	8.85	135.34	45.77	89.57
23	"	60.89	(53.11)	5.93	89.57	47.18	42.39
24	"	59.38	(51.60)	2.81	42.39	48.79	(6.40)
25	"	57.86	(50.08)				(50.08)
26	"	56.35	(48.57)				(48.57)
27	"	54.84	(47.06)				(47.06)
28	"	53.32	(45.54)				(45.54)
29	"	51.81	(44.03)				(44.03)
30	"	50.30	(42.52)				(42.52)

[1]—From Table 1.
[2]—From Table B.

D249

INTERSTATE COMMERCE COMMISSION

SERVED DATE
January 6, 1966

No. 31358

Chicago, Burlington & Quincy R. R. Co., et al.

-v.

New York, Susquehanna & Western Railroad Co., et al.

NOTICE TO THE PARTIES

This is to correct a mathematical error in the figures appearing in Table 35 on Page 160 of the recommended report in the above-entitled proceeding opposite the New York, New Haven and Hartford Railroad as follows:

"N.Y.H.&H. 0.732[4] $1.52 $1.65 $2.01"

There should be substituted for the foregoing, the following:

"N.Y.H.&H. 0.941[4] $1.96 $2.12 $2.58"

Dated at Washington, D. C. this 3rd day of January, A.D. 1966.

By the Commission, R. C. Bamford, Hearing Examiner.

H. NEIL GARSON
Secretary

APPENDIX E

No. 31358[1]

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

Decided January 17, 1968

1. In docket Nos. 31358 and 34405, per diem rates of $2.40, $2.75, $2.88 and multilevel per diem rates for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not shown to be just and reasonable. Just and reasonable rates for use in the settlement of claims between the complainants and defendants determined.
2. In docket Nos. 33145 and 34405, per diem rates and conservative methods of calculation adequate to provide just and reasonable compensation to owners of freight cars and to provide for fair reasonable, and nondiscriminatory assessment of charges upon railroads using such cars, prescribed.

Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leo H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donal L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost, and *Erle J. Zoll, Jr.*, appeared for complainants in docket No. 31358 on rehearing and reconsideration.

[1] This report embraces also docket No. 33145, *Railroad Freight Car Per Diem Charges* and docket No. 34405, *Southern Railway Company et al. v. The Pennsylvania Railroad Company, et al.*, which proceedings were only originally involved on further hearing.

Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis, and *Herbert A. Waterman* appeared for interveners in support of complainants in docket No. 31358 on rehearing and reconsideration.

Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton, Peter Benson Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton, and *Granville Whittlesey, Jr.,* appeared for defendants in docket No. 31358 on rehearing and reconsideration.

William J. Hickey and *J. N. Hood* appeared for interveners in support of defendants in docket No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donal L. Turkal,* and *L. F. Van Kleeck* for respondents in docket No. 33145.

John Guandolo, David G. Macdonald and *Duncan B. Phillips* for complainants in docket No. 34405.

Regionald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donal L. Turkal, E. L. Van Dellen, Harold B. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Wittlesey, Jr., and *Robert W. Yost* for defendants in docket No. 34405.

Lyman C. Bybee for Bureau of Enforcement (formerly Bureau of Inquiry and Compliance), Interstate Commerce Commission.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

BUSH, *Commissioner:*

Exceptions to the report and order recommended by the examiner were filed by several parties, each of which subsequently filed replies to the exceptions of the others.[2] Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically reflected in our findings or conclusions have been considered and found not justified.

HISTORY OF THE PROCEEDINGS

The title case was commenced by a complaint filed September 21, 1953, by 19 of the larger class I railroads against several eastern railroads.[3] The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2 and $2.40 per day charged by railroad freight car owners to other railroads for use of their cars were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads, principally classes II and III, intervened in behalf of the defendants. The Commission on October 17, 1955, found and declared that these rates were not in excess of reasonable compensation during the periods they were effective, that the $2.40 charge was not in excess of reasonable compensation for use at that time, and ordered the proceeding discontinued. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955).

On review by a three-judge United States District Court it was held, one judge dissenting, that the Commission had jurisdiction

[2] Bureau of Enforcement; Boston and Maine Corporation; trustees of the New York, New Haven and Hartford Railroad Company; Southern Railway System; Lehigh Valley Railroad Company; New York Central Railroad Company; Pennsylvania Railroad Company; Long Island Railroad; New Jersey and New York Railroad; Atlantic Coast Line Railroad; Baltimore & Ohio Railroad; Chesapeake & Ohio Railroad; Chicago, Burlington & Quincy Railroad; Chicago & Eastern Illinois Railroad; Chicago, Rock Island & Pacific Railroad; Denver & Rio Grande Western Railroad; Erie-Lackawanna Railroad; Great Northern Railway; Gulf, Mobile & Ohio Railroad; Illinois Central Railroad; Louisville & Nashville Railroad; Missouri Pacific Railroad; Norfolk & Western Railroad; Northern Pacific Railroad; St. Louis-San Francisco Railroad; Seaboard Air Line Railroad; Soo Line Railroad; Southern Pacific Company; Union Pacific Railroad; Western Maryland Railroad; Western Pacific Railroad; and Atchison, Topeka & Santa Fe Railroad.

[3] The original defendants included the Boston & Maine; New York, New Haven and Hartford; Long Island R. Co.; New Jersey & New York; Rutland, St. Johnsbury & Lamoille County; and New York, Susquehanna & Western.

under sections 1, 13 and 16 of the Interstate Commerce Act and section 5(d) of the Administrative Procedure Act (5 U.S.C. §1004 (d)) to enter orders awarding damages and, to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al.* v. *United States*, 162 F. Supp. 289 (1958). The court further held that (1) the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis a recommendation that the railroad accounts pertaining to car-hire costs be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car; (2) where depreciation of freight cars was an important element of per diem charge for use on railroads' lines of freight cars owned by other railroads, the Commission in determining unreasonableness of such charges should not have tossed aside as irrelevant accepted accounting practices for determining depreciation based on undepreciated ledger value and should not have accepted "undepreciated [re]production (sic) value"; (3) the Commission erred insofar as it considered car age a factor in computing car utilization; and (4) where time-mileage plan for determining charges for use on railroads' lines of freight cars owned by other railroads involved a separation of national aggregate car ownership cost into two categories, such plan, under facts, deserve more than cursory consideration given to it by the Commission in determining the reasonableness of said charges, since without more detailed findings by the Commission, the court could not exercise its judicial function. The court thus set aside and annulled the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the court's opinion.

On appeal to the United States Supreme Court, the Commission expressed its readiness to proceed in accordance with the terms of the remand, recognizing that further investigation and more detailed findings would be required to comply with the lower court's opinion. The Supreme Court recognized, however, that:

> Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate.

Boston & Maine Railroad v. *United States*, 358 U.S. 68. On March 24, 1959, the proceedings were reopened for further hearing.

On July 24, 1959, by order in docket No. 33145, we initiated prescriptive action under section 20 of the act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car, per diem charges, and ordered an investigation pursuant to section 1(14)(a) with a view toward ascertaining the need for establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the act were made respondents. At the same time, the proceedings in docket Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate of compensation was to be established. This agreement had been approved by the Commission pursuant to section 5a of the act, and became effective on October 7, 1950.[4] On June 10, 1953, these defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[5] Thereafter they continued to receive and deliver cars of other lines but paid rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

[4] *Association of American Railroads—Agreement*, 277 I.C.C. 413; *Ahnapee & W. Ry. Co. v. Akron & B. B. R. Co.*, 300 I.C.C. 73, 302 I.C.C. 265. This agreement provides for use of the services of the General Committee of the Operating-Transportation Division of the Association of American Railroads, and the board of directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates submitted to the members of the agreement by the AAR board of directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the association, together with the use of the association's facilities and committees to administer the provisions of the agreement, have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid.

[5] The first railroad to refuse payment was the New York, Susquehanna & Western Railroad Company which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2 rates. Subsequent to the institution of proceedings in docket No. 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with respect to the rates preceding the $2.40 rate.

Following the institution of proceedings in docket No. 31358 there were filed in the United States District Court, Southern District of New York, 109 complaints, consolidated by the court for all purposes, wherein numerous railroad plaintiffs seek to recover from the New York, New Haven and Hartford, and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1, 1959, and since then of $2.88,[6] less interim payments of about $2 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the court disposed of several motions and directed entry of partial interlocutory summary judgment in favor of 21 of the plaintiffs extending only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are ultimately found by the court to be due them:

*** * * based upon a rate to be found just, fair, reasonable, and nondiscriminatory by the Interstate Commerce Commission, of which said Commission shall advise this court and thereafter to be ultimately determined and fixed by this court for each month beginning with August 1953 to date to be computed with interest.**

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending our determination of the controversy in docket No. 31358 or until further order of the court. By order entered on December 19, 1962, leave was granted to amend the complaint in this proceeding so as to request the Commission to furnish the desired findings.

The Illinois Central Railroad Company, one of the complainants in docket No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, county of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63. In each case, the plaintiff sued

[6] Whether these proceedings include charges accruing thereafter, or include charges based upon the multilevel rates, effective January 1, 1964, are not of record. A few of the suits have been settled by agreement of the parties.

the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in docket No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in docket No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in docket No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (docket No. 34405), pursuant to section 1(14)(a) of the act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multilevel per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in docket Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in docket No. 31358 leave to further amend their complaint so as to bring in issue the multilevel rates which had become effective on January 1, 1964.

We have heretofore observed that the performance of orderly and efficient transportation service by rail will be improved by uniform observance of per diem charges by all carriers. *Association of American Railroads—Agreement, supra.* That conclusion is unmistakably confirmed by the record in these proceedings. The examiner recommended that the railroads continue to administer per diem through the facilities of the per diem agreement, and that the Commission not enter an order at this time which would supersede the procedures and the rights of the parties to that agreement. Upon consideration of the entire record, and the pleadings subsequent to the examiner's report, we find the necessary accord among all participating railroads to be lacking. Our

order herein will, therefore, provide for specific per diem rates and procedures applicable to all railroads and will supersede any existing procedures which are inconsistent herewith.

Issues

The issues presented by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car-owning railroads for the use of their cars by other railroads were just, reasonable, and compensatory as provided in sections 1(10), 1(11), and 1(14)(a) of the act; and if not, what rates would meet the standard for that period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future. However, our findings in docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits. For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

Background

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to retain them in their own service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling traffic proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for movement beyond without disturbing the lading. Cars involved in this interchange service with which the charges here in issue are concerned, are customarily referred to as "per diem" cars. Certain cars, such as refrigerator and tank cars handled under special arrangements, are not involved.

With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 44-45; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615. While

contributing to transportation efficiency, this method of operation created certain problems with which the industry has wrestled ever since.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I.C.C. 591, 593-594; *Morehead & North Fork R. R. Co.* v. *C. & O. Ry. Co.*, 100 I.C.C. 45, 48; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, 102 I.C.C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's the rates were generally 1 cent per mile on cars of special construction, and 3/4 cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and time plan, and two central western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *United States*, *supra*. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car. By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day.

Subsequent increases were as follows:

Effective November 1, 1949—	$1.75
May 1, 1952—	2.00
August 1, 1953—	2.40
January 1, 1957—	2.75
December 1, 1959—	2.88
January 1, 1964—	multilevel rates

The multilevel rates which became effective on January 1, 1964, were as follows:

Value bracket	*Per diem rate*
(1) $1,000 and less	$2.16
(2) 1,001 to 5,000	2.79
(3) 5,001 to 10,000	3.58
(4) 10,001 to 15,000	4.50
(5) 15,001 to 20,000	6.15
(6) Over $20,000	7.74

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by bracket No. 6, as follows:

(6) $20,000.01 to $25,000	$7.11
(7) 25,000.01 to 30,000	9.00
(8) 30,000.01 to 35,000	10.18
(9) 35.00.01 and over	12.18

If there were but two railroads, and each used the other's cars to the same degree, the payments would balance and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. Nearly all railroads are car owners, and all railroads are users of cars owned by the others. In 1960 there were over 100 class I line-haul railroads, over 300 class II line-haul railroads, and about 200 classes I and II switching and terminal companies and electric railways involved in these payments. The significant figures are the net payable balances and at any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year. Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status. Those having a high ratio of terminations to originations are generally net per diem debtors.

The Statute and Nature of Per Diem

Section 1(10) of the act defines "car service" as including the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to

part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it.[7]

In prescribing the compensation for the use of foreign cars pursuant to section 1(14)(a) of the act, the Commission is exercising its statutory authority to establish basic per diem predicated upon costs. The owner of a car, required to release possession thereof to another carrier for the further transportation of the freight it contains, may not be deprived of its use without compensation. On the other hand, the carrier obtaining the use of the car is required to accept possession for the purpose of continuing the transportation, and may not be required to pay therefor more than the average cost it would have incurred as owner of the car or by use of its own car. The two requirements cannot be met except by calculation of the average ownership burden based upon costs, measured with such accuracy as is reasonably possible and distributed among the car users and owners in a manner which can be found most equitable to all. We agree with the conclusion of the examiner that the "compensation" mentioned in section 1(14)(a) of the act relating to "basic" per diem does not include any element of profit to the owner of the car and may not be measured by the benefit which the user derives from use of the car. Per diem charges are in the nature of a reciprocal charge and are designed to represent the average cost of car ownership. The charge should be equivalent to the average car ownership costs which the users would have to bear if they owned the car. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, *supra*; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, *supra*; *Marcellus & Otisco Co.* v. *N. Y. C. R. R. Co.*, 104 I.C.C. 389, 392, *Rules for Car-Hire Settlement*, *supra*; *Keith Ry. Equipment Co.* v. *Assn. of American Railroads*, 274 I.C.C. 469, 482; *Palmer* v. *United States*, 75 F. Supp. 63. "It has long been generally recognized that car hire, however established, should be

[7] Customarily referred to as a "foreign car."

enough reasonably to compensate the car owner for its costs of ownership and no more * * *." *Boston & Maine Railroad* v. *United States*, *supra*.

This conclusion is confirmed by the 1966 amendment to section 1(14)(a) and the statutory history relating thereto. The basic per diem charge may not be used, or include sums as elements of compensation, to enforce car service rules, encourage car acquisition, et cetera; these functions being reserved for the added incentive element when found justified. As amended by Public Law 89-430, section 1(14)(a) now provides, in part:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

In its prior form, this statute also required the compensation to be reasonable and we do not view the added language as making any change in this respect.[8] As a result of this amendment, however, the function and composition of basic per diem rates have been clarified. They are applicable to per diem cars generally, and are to be computed solely on the basis of elements of ownership expense involved in owning and maintaining the cars, including a fair return on value. Per diem charges may not include any amount for the value of the use of a car. See Cong. Rec.—House—May 12, 1966, page 9946.

There is sound reason why these per diem charges should constitute no more than a sharing of cost. We are not concerned with the problem of calculating proper charges to customers of the respondents, but with the assignment among a group of carriers engaged in multitudinous joint ventures, of the burden of acquiring and maintaining the vehicles used by all. Not only is their use compulsory

[8] Thus at Cong. Rec.—House, May 12, 1966, page 9945, "The amendment first restates in clear language what the courts have held to be the limitations of the law as it is now written."

on the paying line but a great deal of the use which is made and for which charges are paid is not productive of revenue to the user. This occurs on empty return of cars to owners which, in many instances, is accomplished by carriers who did not participate in the loaded revenue movement which took the car off line. The relationship of the parties is not that of a lessor and lessee, and the term "rent" frequently employed to describe the per diem charge does not connote such a relationship.[9]

Costs

Upon reopening of docket No. 31358, we instituted the investigation proceeding, docket No. 33145 and incorporated therein an order under section 20 of the act, requiring the filing of special reports by all railroads. These reports were analyzed by staff personnel of our Bureau of Accounts and a series of cost computations were made which were thereafter served upon all parties and submitted in evidence. We adopt as a correct statement of the facts, the description by the hearing examiner of these reports and computations, and of those employed by the AAR staff in developing the per diem rates adopted by the members of the per diem agreement. The pertinent portions of the examiner's report are set forth in the appendix to this report.

Generally recognized as the largest single item is the group of costs properly attributable to the repair and maintenance of cars in interchange service. After consideration of the various criticisms directed to the cost calculations prepared by the Section of Cost Finding, Bureau of Accounts, the examiner concluded that the ownership costs developed by the studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities for 1960, were as accurate as could reasonably be obtained and fairly represented the total ownership costs for the year.

Car repair costs and associated maintenance expenses, as developed by the 1960 Section of Cost Finding studies and analysis are as follows:

[9] In the instance where a carrier makes use of a foreign car for movements in violation of the car service rules, it can more reasonably be said that it is "renting" the car. Conceivably, a higher charge would be appropriate in such instances but this is a problem having to do with penalty charges to enforce the car service rules, not with compensation to the owner for the ownership burden.

1. Freight-train car repairs including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars.	$583,715,117
2. Depreciation on freight-train car repair facilities computed on undepreciated original cost.	$8,023,021
3. Property taxes on car repair facilities.	$3,824,341
4. Payroll taxes	$28,140,156
5. Return on investment in freight-train car repair facilities computed at 4 percent (after income taxes) on depreciation original cost	$11,489,897
6. Return on working capital	$2,896,316
Total	$638,098,858

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. Exceptions to the examiner's report do *not* challenge the method or accuracy of this computation insofar as it calculates the total ownership cost of repair and maintenance, but are directed to the apportionment of those costs between home and foreign cars and the development of an amount referred to as the "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made necessary by improper use and handling of the car are not considered ownership responsibility items, and the costs are customarily borne by the responsible railroad. For the purpose of computing per diem rates, ownership repair costs are those made necessary by ordinary usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to pay users for repairs made by the latter. The figures used by the Section of Cost Finding in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully paid users, and had thus borne themselves all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners pay to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting per diem rates. Of the $583,715,117 of total ownership responsibility repairs for the year 1960, as computed by the Section of Cost Finding, the distribution produced by the sample studies indicates that $186,482,539

was accomplished by user railroads and that $98,534,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1960, the latter amounts to 41.417 cents per day.

Certain of the respondents challenge the accuracy of apportionments used in developing this "repair deficiency," and renew their objections to the refusal of the hearing examiner to receive certain exhibits related thereto. Also excepted to by other respondents is the refusal of the examiner to deduct the deficiency from total ownership costs before calculating the per diem rate.

The exhibits in issue were not submitted in compliance with the special rules of procedure established for the conduct of these proceedings and were properly excluded. In view of our conclusions with respect to the "repair deficiency" it is unnecessary to give further consideration either to these exhibits or to the challenged Section of Cost Finding calculations and apportionments. The determination of reasonable compensation to the owner of a freight car for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to becloud the solution sought in this proceeding. Introduction of contentions regarding the adequacy of reimbursements by owners would import into this case a secondary dispute, and put on trial the AAR method of establishing the standard charges between railroads for repair of each others cars.

In computing the ownership costs it is proper to take into account all expenses incurred in maintaining interchange cars in operable condition, other than user responsibility items. Whether the costs incurred by users in effecting ownership responsibility repairs are fully reimbursed to them under another set of rates and regulations made by the carriers' own organization is irrelevant. The methods used to compute those rates are subject to review and revision by the AAR, as found necessary. To compute and apply a fixed amount as a deduction from total ownership costs before calculation of the per diem rates would tend to freeze into its present mold the method used by the AAR in an entirely separate area.

Such a deduction requires the assumption that, in all cases, with respect to each owner, the total cost of repairs made by each user to cars of that owner exceeds by precisely the same amount the sum paid by the particular owner to the user as reimbursement under the AAR rules. No logical relationship was shown to exist

between the number of foreign car days on line on which per diem would be computed, the amount of repairs made, and the fixed amount of the deficiency allowance. The evidence with respect to car days and reimbursements is persuasive that application of the car-repair deficiency as a flat reduction in the per diem rate would produce an inequitable distribution among the carriers. Users who accomplish few repairs but have a relatively high proportion of foreign car days on line would receive excessive reimbursement, and *vice versa*. The impact upon owners would also be inequitable. Each owning line would suffer the same reduction in its per diem receipts, regardless of the line using its car. The effect would be to require owners to overcompensate users in some instances, while undercompensating other users.

Certain respondents contend that reduction of the per diem rate by application of the average amount of repair deficiency is no more than another application of average costing to a problem which admittedly must rely upon averages with respect to many items. The distinction, however, is that reliance upon an average in this instance is not required. Settlements of repair reimbursements are made regularly by and between individual carriers by billings for specific repairs. It is clearly possible, by making these billings properly renumerative in each instance, to effect reimbursement according to actual costs and avoid the inequities inherent in averaging.

The argument is made that allowahce of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since allegedly, they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem rate allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four contend that the deficiency should be calculated and subtracted from the

total ownership costs in determining the per diem rate.[10] None including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only two, the New Jersey and New York and the Long Island Railroad, appear on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75 for repairs it made to their cars and paid the same lines $162,117.08 for repairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times its unreimbursed costs in repair costs on its cars which it did not reimburse.[11] The New Haven, in 1960, received $92,316.30 for repairs which it made and paid the same lines $309,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.[12]

Losses due to the repair deficiency are incurred only to the extent that a line makes more repairs to the cars of another than that other makes on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and can employ some selectivity in their choice of cars to supply to shippers. Both exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars primarily to put them in condition to pass safety tests of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been considered necessary by that

[10] The Boston & Maine Railroad, New York, New Haven & Hartford Railroad, Long Island Railroad and New Jersey & New York Railroad.

[11] Using the 47.55 ratio of unreimbursed costs indicated by the Section of Cost Finding calculation (reimbursements $87,948,519—unreimbursed $98,534,020), the B&M failed to recover some $65,255.46 in costs of repair work it did on cars of other lines, but received repair work from them, on B&M cars, which cost $182,912.90 more than it paid.

[12] Of these 18 railroads, the B&M received the benefit of more repairs than it accomplished with respect to 15. Two of the remaining had balances of less than $300 and the other had a balance of less than $2,000. The New Haven had an unfavorable balance with respect to but one railroad, having accomplished repairs to Western Maryland Railroad cars some $7,045 more than that line effected on New Haven cars.

railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It and the New Jersey and New York Railroad are the only lines suffering a loss from this situation which seek to have it remedied by a reduction in the per diem charges. As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Section of Cost Finding this would indicate a possible unreimbursed amount, using the average figure, of $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repair itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[13] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The

[13] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's car, but paid that line $13,842.48 for user repairs on NYC cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

experience of the New Jersey and New York Railroad in this respect is not shown.

All other respondents oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which contend that use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines will obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding the losses they sustained in making undercost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. It cannot be found that failure to deduct the deficiency from the per diem rate would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

The analysis employed in developing the repair and maintenance costs of per diem cars by the Section of Cost Finding is based upon more recent data than that employed in the analysis used by the AAR. (See appendix.) As hereinafter discussed, the various ratios and apportionments developed by the 1960 studies are, in large part, useable in the calculation of costs for other years under this method. Insofar as the development of total ownership cost of repair and maintenance of per diem cars is concerned, no persuasive objections to its adoption have been shown. Upon the record, we find that, subject to adjustments hereinafter mentioned, the total per diem ownership repair and maintenance costs developed by use of the method appearing as schedule I of the Section of Cost Finding analysis fairly and reasonably measures the amount for which owners should be reimbursed. We shall require that this method be employed in the

calculation of per diem ownership repair and maintenance costs for the purpose of setting per diem rates in the future.

Property taxes on freight cars are so varied from State to State and for various periods as to make precise measurement impracticable. The amount is estimated by both the AAR and the Section of Cost Finding by use of a factor developed by taking a ratio of all property taxes to total investment and applying this ratio to the investment in freight cars. In recent years the ratios have varied from slightly under to slightly over 1 percent. We find that this procedure results in a just and reasonable allowance for this expense.

Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for 1 year and an amount representing an interest return on the undepreciated balance of the cost. In the calculations underlying the AAR rates prior to 1953 the average original cost of all cars as the base for depreciation was used. In subsequent years the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight-line method of depreciation has been used, at the average rates used by carriers and authorized by the Commission, approximating 3.0 percent. In effect, this has amounted to an allowance of 10 percent of car cost as salvage value and a spreading of recovery of the remaining 90 percent over an assumed life of about 30 years. Beginning with the studies underlying the $1.50 rate in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. In studies underlying the $2.75 and later rates, depreciated reproduction cost was used as the base. In all instances, interest was computed at 6 percent before taxes.

The present multilevel system of per diem rates also provides for investment costs by including amounts for annual depreciation and interest on the undepreciated balance of the cost. Under this system, the cars are grouped in nine brackets, six of which cover spans of $5,000, one a span of $4,000, one a span of $1,000, and the last, all cars costing over $35,000.01. Cars are placed in a bracket according to their original cost plus additions and betterments, depreciated. The rate applicable to all cars in each bracket, however, is based upon allowances for depreciation and

interest using the weighted average of the reproduction costs of the cars.

The analysis prepared by the Section of Cost Finding in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight-line depreciation was used at a rate of approximately 3 percent. Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. Southern Railway seeks the use of a shortened depreciation period of 14 years while, on brief, certain other respondents contend that the 30-year period should be retained for cars in the 3 lower AAR value groups, but that a shortened period of 20 years be employed for cars in the higher groups. No evidence was offered in support of the latter suggestion and we find that neither of the shorter periods are practicable at this time.

Attention is called to the fact that recent revisions of regulations of the Department of the Treasury may permit railroads to employ a 14-year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value comprises only a portion of the total involved. The test is based upon dollar totals rather than with reference to the lives of specific equipment.

The record demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over 20 years old, and over 49 percent were over 15 years old. Of 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,938, or 17.92

percent of the total. No tendency to a reduction in the useable life of cars is indicated. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use. Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and interest represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

The expected useful life of the car is a measure of the appropriate annual depreciation charge only when considered in connection with the portion of the cost to be depreciated. Deduction of 10 percent of the cost as the anticipated salvage value is a customary and convenient method of fixing the portion but it is not necessarily more reliable than other possible choices. The Section of Valuation and Depreciation of the Bureau of Accounts employs an estimated 17-percent salvage value and a 25-year life, which indicates an annual rate of depreciation of 3.32 percent. The total depreciation reported in railroad annual reports to the Commission in 1960 for freight cars was $205,740,270, of which $197,060,088 was assigned to per diem cars by the Section of Cost Finding analysis of the distribution of per diem and non-per diem cars. In addition, this analysis allowed $17,594,870 taken from Rail Form A calculation of normal depreciation applicable to per diem cars already amortized. The total of $214,654,958 amounts to 3 percent of the Rail Form A total original cost of these cars as of December 31, 1960, of $7,063,892,859. The record shows depreciation rates of freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent. We find that an annual allowance of 3 percent of the cost of freight cars as a portion of the costs employed in calculating per diem charges provides just and reasonable contribution by car users and adequately provides for reimbursement of car owners for the loss in value of the car.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of

railroad freight cars which has occurred in the past 20 years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the $1 per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variances in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[14] The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities in the costs of the various cars now in use. The differences in the original costs of modern cars have made unrealistic the application of a single, uniform per diem charge. In order to provide reasonable compensation to car owners, charges must be assessed which reflect, as accurately as possible, the particular acquisition cost of the car in use. At the same time, there also arises a need to exercise care in determining the amount necessary to reimburse owners for that cost.

Certain respondents contend that rates varying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, make it necessary to apply varying rates in order to compensate for the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization. No studies were made with respect to this alleged distinction in the car-day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

[14] Between 1915 and 1945 the Bureau of Valuation cost index for Account No. 53, Freight Train Cars, rose 154 points, an average of about five points per year. Between 1945 and 1960 the increase was 365 points, or nearly 25 points per year.

A similar conclusion is required with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission.

We consider ill-founded the contention that nationwide average costs should not be used in the calculation of per diem charges. This has been the industry practice for many decades, and in no other way can uniform charges be reasonably constructed. That the costs experienced by different car owners vary, and, as a result, the extent of their reimbursement through the per diem payment will vary, is a consequence which must be accepted if the uniformity in charges which we have found essential to orderly and efficient transportation by rail is to be achieved.

REPRODUCTION COSTS

One of the major issues in these proceedings is the extent, if any, to which reproduction cost should be employed as the base for calculation of depreciation and interest. We have observed that equitable treatment of both car owners and car users requires that the actual costs be measured with such accuracy as is reasonably possible. If car owners are to be compensated for some additional amount, it is incumbent upon those asserting the same to establish the propriety of the payment.

It is common knowledge that the purchasing power of the dollar has been steadily reduced over the past 20 years. Many more dollars would be required to reproduce today a car originally built 20 years ago, and a car owner, receiving payments from car users in dollars of current purchasing power, does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the pur-

chasing power of the dollars used, and would reasonably be expected to bear a share of that erosion. The use of reproduction cost as a base attempts to translate into dollars of today's value the number of higher value dollars invested in the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually invested by the owner appears essential to fair compensation. Thus, to the extent that the per diem charge is comprised of reimbursement of such funds, the contribution of users to the cost should be measured in dollars of purchasing power equivalent to those invested.

Proponents of the unrestricted application of reproduction cost to the full cost of the freight cars have failed to show that this method of calculation provides a reasonable measure of the actual costs incurred. In periods of rising prices, borrowing shields an investor from decline in purchasing power. The risk of decline is borne by the lender and clearly no need exists to compensate the investor therefor. The evidence in this record requires the finding that carriers do not finance the entire cost of purchase or construction of cars out of railroad funds. Commonly the larger part of the needed amounts is obtained through various security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid is fixed by agreement. Generally, the term for repayment of principal of such loans is about 15 years, with interest on the unpaid balance varying between 2 and 6 percent. The Section of Cost Finding studies in 1960 indicated an average interest rate on outstanding obligations of 3.849 percent. While the actual portion of the cost borne by owners in the first instance varies, the average approximates 20 percent.

Car owners are required to repay to the underwriters of equipment obligations only the same number of dollars originally provided. Repayment of principal and interest charges on these sums is effected in dollars of current value at the time of payment. The freight car owner incurs no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars, and should not receive from users a contribution measured by this inflation. We find no justification for increasing these costs by use of a reproduction cost base. To compensate the owner for principal and interest which it must pay on obligations incurred to purchase the car, users should contribute no more than their proportion of the amount actually payable. These

charges are not based upon an inflated loan figure and should not be so inflated when passed on to users.

Where a car owner has paid part of the cost of a new car with its own funds, and recovers each year a portion of its investment from per diem receipts, the inclusion of interest on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that interest should be inflated with the passage of time by application of an index to the original amount invested purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternative investments would have undergone any appreciation, or if they had, that the owners would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternative investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the unrecovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power.

It is asserted that separation of the elements of acquisition cost in this fashion is a novel approach not considered at the hearings. The demand for increased charges based upon the use of reproduction costs, however, makes inevitable a determination as to the validity of this procedure. The order instituting docket No. 33145 identified the proceeding as an investigation under section 1(14)(a) of the act for the purpose of establishing reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-

owned freight cars which are not owned by the using carrier. All parties were aware that the extent to which reproduction costs were to be used was one of the primary issues. The United States District Court had specifically identified this issue in remanding the proceeding in *Boston & Maine Railroad* v. *United States*, *supra*. Application of the reproduction cost index to a portion of the annual cost was the procedure used in the AAR calculations prior to 1953. There is nothing novel or unusual about its use here.

With the costs of modern cars rising and substantial portions of the price being financed, it becomes essential to a just and fair result that a reasonable measurement be made of the annual portion which is actually affected by inflation. In referring to a fair return on value, Congress did not intend that car owners were to be compensated for fictitious costs. Such would be the result of computing charges for depreciation and interest using the reproduction cost and depreciated reproduction cost, respectively, of the car, without consideration of the portion of the cost actually representative of the owner's investment. Unless we are to find that per diem charges shall be computed solely and directly on the original cost of the car, no choice exists but to consider the various means by which the funds are obtained to acquire cars and the extent to which they produce a real cost to the purchaser.

Much of the argument in support of a blanket application of reproduction cost is founded in a "value of use" concept which, as we have pointed out, is inappropriate for application to the activity with which we are concerned. It would require users, whether using the car in a joint move participated in by the owner, in a revenue move not participated in by the owner, or returning the car empty in a non-revenue move, to pay the owner the full amount, including profit, that the owner could get from on-line use of the car. The legislative history of the 1966 amendment to section 1(14)(a) clearly prohibits any allowance based upon this concept. See Cong. Rec.—House, May 12, 1966, page 9946.

Those respondents who support application of reproduction cost in full and use of higher rates of interest assert that these are necessary due to the failure of new, more attractive cars to be returned to the owner's line with satisfactory frequency. Experience of some railroads indicates that such cars spend a greater proportion of the year off-line than older, and perhaps less de-

sirable cars. The record is not in sufficient detail, however, to support findings with respect to the actual loss of remunerative use suffered by the owners in such cases. The higher days-off-line record of the newer cars may, to some extent, be the product of their prompt reloading and forwarding by the owner when received back from a prior movement. Pending changes in the car-service rules may result in improved return of cars to owning lines but, to the extent that an owner fails to obtain the amount of productive use of a new car reasonably to be expected in interchange service, in light of the requirements of its shippers, the answer is not to require all users of all cars to pay excessive charges. Improvement in car service rules and diligence in their enforcement is required.

Another ownership risk, for which compensation is sought by use of reproduction costs, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This risk, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car-day divisor excludes a large percentage of home surplus and bad order cars, on owner's lines, while the dividend includes the costs of all cars. The quotient is thus enlarged so as to spread over all days of active cars a rateable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, not in use by reason of the above-mentioned risks, receive in the daily car-rental payments for cars in active use a share of the costs of the idle cars.

We have found that the average investment by car owners in the original acquisition cost of cars is 20 percent and that, in general, the principal amount of equipment obligations is required to be paid in 15 years. While precise reimbursement of the ownership burden would require proportionate contribution of the costs of ownership in the same amounts and within the same period of time that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a 30-year period, the impact of car-hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the 30-year period have been greater than would have been received by using a

shorter period. In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of this discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

Where an owner finances a substantial part of the original cost of the car, and is required to meet annual payments of principal and interest spread over a period of 15 years, contributions from car users based upon a depreciation allowance spread over a period of 30 years require the owner to carry the difference between its payments and the annual contribution by users. This is additional contribution by the owner to the capital cost of the car which must be recognized. An allowance for interest on these added sums, and for inflationary impact thereon, is appropriate. The examiner concluded that reasonable compensation to owners would be accomplished by allowing interest and application of reproduction costs to 40 percent of the original cost over the 30-year period, and treating the remaining 60 percent of the original cost as funds upon which changes in dollar values had no impact upon car owners. In so doing he allowed car owners to recoup in the last 15 years for excess amounts paid by them during the first 15 years.

Table I, below, shows the approximate average annual costs per $1,000 of original cost where recovery of 80 percent is accomplished within 15 years, including interest at 4 percent; all other costs being spread over a 30-year period. Table II allows 60 percent as the financed amount and spreads all costs over the 30-year period.

In table I the reproduction cost index is applied only to the 20-percent average original investment of the car owner, while in table II it is applied to 40 percent of the original cost for the entire period.[15] In each table, taxes are spread over the 30-year period. Where 40 percent of original cost is treated as the investment of corporate funds by the owner, and 60 percent is spread over 30 years instead of 15, compensation by users during the first 15 years per $1,000 of original cost is approximately $200 less than shown on table I. This amount is more than

[15] The additional 20 percent is actually invested in yearly payments to the amortization of capital costs provided in the first 15 years.

recovered before the 20th year, however, and in subsequent years the additional amounts are sufficient to compensate for the use of the added fund.

Per diem charges constructed strictly in accordance with table I would result in substantial variations in revenues, with an excessive reduction occurring in the 16th year. We consider that charges generally constructed as shown in table II to be superior. The choice herein made is obviously not the product of exact measurement. Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment. We find that allowance for inflation on 40 percent of the original cost over the 30-year depreciation period results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds. See: *Chicago, R. I. & P. Ry. Co.* v. *U. S., supra; Chicago & N. W. R. Co.* v. *A. T. & S. F. R. Co.*, 387 U.S. 326 (1967). As pointed out in *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 478, the distinctions in relationships of the parties require treatment of this problem which, while differing, is not inconsistent with our conclusions herein.

Calculations of certain parties which purport to support higher per diem charges by allowing reproduction costs on the car owner's increasing equity over the life of the car are not persuasive. This increasing equity is a benefit which accrues to the owner by virtue of the contributions of the users. If the car is off line the entire year, the entire additional equity beyond the original owner's downpayment is paid by users. No logical basis exists for requiring them to pay also additional amounts due to the subsequent depreciation in purchasing power of funds which they themselves contributed and which funds were themselves raised to adjust for such changes. That the car-obtaining line receives the benefit of sole ownership when purchase obligations are terminated gives it no additional right to payment from the others.

In fact, it is more common for cars to be off line only part of each year, and during the time they are on the owner's line

other railroads are not contributing to their cost. During these periods, however, the owner is the user and payments made by him on the purchase obligations perform the same function as contributions by other users. The end to be attained is the fair reimbursement of the owner for those amounts which it actually pays as owner, over and above contributions, or constructive contributions, which it makes in its capacity as user. The increase in its proportionate ownership of the car over the latter's operating life provides no measure of this amount. Notwithstanding the attempts made to suggest some differing relationship, we are of the view that the use of per diem freight cars is made pursuant to a relationship in the nature of a partnership, wherein all users, including owners, contribute their share of the ownership obligations, proportionate to the use made by them.

TABLE 1

Summary of investment costs—per $1,000 original cost 40 percent loans, [illegible] 15 years—variant No. 33 index on 50 percent cash 50 percent

Year	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Year numbers 3 4 5 6 7	5-Year average
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

TABLE II

Summary of investment costs - per $1,000 original cost account No. 52 under an
80 percent - reimbursement for years on all charges

Line no.	Adjustment factor for appropriate for [illegible]	Adjustment recovery of owner's capital cost[1]	Interest on investment balance[2]	Reimbursement of principal of financed funds[3]	Reimbursement of interest charges on financed funds[4]	Reimbursement of property taxes[5]	Total columns 3, 4, 5, 6, 7	5-Year average
	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	1.000	10.00	20.75	20.00	23.60	10.03	84.38	.....
2	1.003	10.00	20.10	20.00	22.80	9.72	82.62	.....
3	1.003	10.43	20.43	20.00	22.00	9.42	82.30	82.30
4	1.003	10.03	20.80	20.00	21.20	9.11	81.14	.....
5	1.004	10.04	20.19	20.00	20.40	8.81	79.44	.....
6	1.014	10.18	20.50	20.00	19.60	8.51	78.79	.....
7	1.026	10.26	21.05	20.00	18.80	8.20	78.31	.....
8	1.039	10.39	21.20	20.00	18.00	7.90	77.49	.....
9	1.049	11.19	20.55	20.00	17.20	7.80	76.74	.....

Summary of investment costs - per $1,000 original cost account No. 53 index on 40 percent-reimbursement 30 years on all charges—Continued

Year in service (1)	Adjustment factor to compensate for inflation (2)	Adjustment recovery of owner's investment[1] (3)	Interest on investment balance[2] (4)	Reimbursement of principal of financed funds[3] (5)	Reimbursement of interest charges on financed funds[4] (6)	Reimbursement of property taxes[5] (7)	Total columns 3, 4, 5, 6, 7 (8)	5-Year average (9)
10	1.219	12.15	19.90	20.00	15.40	7.29	75.77	.....
11	0.814	13.14	19.25	20.00	15.60	6.99	75.27	.....
12	1.397	13.97	18.60	20.00	14.80	6.69	74.06	.....
13	1.419	14.19	17.91	20.00	14.00	6.34	72.52	72.42
14	1.519	15.15	17.30	20.00	13.20	6.08	71.73	.....
15	1.569	15.64	16.62	20.00	12.40	5.78	70.51	.....
16	1.597	16.99	16.00	20.00	11.60	5.47	70.02	.....
17	1.747	17.47	15.35	20.00	10.80	5.17	68.79	.....
18	1.637	16.33	14.70	20.00	10.00	4.47	67.90	68.22
19	1.965	19.65	14.05	20.00	9.20	4.56	67.46	.....
20	2.091	20.91	13.40	20.00	8.40	4.26	66.97	.....
21	2.476	24.76	12.75	20.00	7.60	3.96	69.07	.....
22	2.479	24.79	12.10	20.00	6.80	3.65	67.31	.....
23	2.478	24.78	11.45	20.00	6.00	3.35	65.56	66.27
24	2.577	25.77	10.80	20.00	5.20	3.05	64.82	.....
25	2.833	28.33	10.15	20.00	4.40	2.74	65.62	.....
26	2.953	29.53	9.50	20.00	3.60	2.44	65.07	.....
27	3.113	31.13	8.85	20.00	2.80	2.14	64.92	.....
28	3.243	32.42	8.20	20.00	2.00	1.83	64.47	64.06
29	3.242	32.42	7.55	20.00	1.20	1.55	62.72	.....
30	3.459	34.56	6.90	20.00	0.40	1.24	63.10	.....
Over 30	.....	.....	6.52	.....	.....	1.02	7.54	7.54

[1] Based on 1961 account No. 53 index of 529 for first year.
[2] Twenty percent of cost minus salvage divided by 30 years and multiplied by column 2.
[3] Interest on mid-year balance of 20 percent of cost as reduced by annual recovery of $3.81 at 4.52 percent per annum.
[4] Eighty percent of cost divided by 15 years.
[5] Interest on mid-year balance of 40 percents of cost as reduced by column 5 payments at 4 percent per annum.
[6] Taxes at 1962 figure of 0.016 multiplied by mid-year value of all taxes on original cost reduced 3 percent per annum.
[7] Forty percent of cost minus salvage divided by 30 years and multiplied by column 2.
[8] Interest on mid-year balance of 40 percent of cost as reduced by annual recovery of $1.076 at 4.52 percent per annum.
[9] Taxes at 65 percent of cost divided by 30 years.
[10] Interest on mid-year balance of 60 percent of cost as reduced by column 5 payments at 4 percent per annum.

The index of freight car costs used as a measure of the reduction in the purchasing power of the invested sums is the product of a joint effort by the Association of American Railroads and the Commission's Bureau of Accounts, Section of Valuation,[16] and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indices are published by the Section of Valuation and Depreciation to correspond with specific primary accounts of railroads, as listed in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, freight-train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

While the record contains little by way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that, although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, et cetera which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted. It also appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed and draft gears design advances.

In a period during which no appreciable changes occurred in the design, size, or equipment of freight cars, the Account 53 index of construction costs might be treated as a reasonably reliable measure of reproduction cost and, under average economic conditions, of changes in the purchasing power of dollars invested in freight cars. In periods such as we have experienced since 1946, however, we think this index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations. The

[16] Alabama [illegible] Aberdeen & N. W. Co., 274 I.C.C. 383, 403; 332 I.C.C.

many changes in manufacturing processes, metallurgical developments, changes in design and structure, et cetera which have occurred are reflected to an immeasurable extent. Under these conditions, these approximations decline in validity as they are applied to more distant past years. Beyond a limited past period we are of the opinion that this index produces increases in reproduction costs which are so indeterminate as to render them unsatisfactory as measures of per diem costs. Thus, a more equitable method of allowing car owners to recover for the effect of inflationary forces is to make an appropriate increase in the rate of interest allowed on their invested funds, which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods. In the following calculations, capital charges have been computed in this fashion.

In addition to allowing application of the reproduction costs to 40 percent of the original cost, the examiner allowed an interest rate of 4 percent after taxes on the unreimbursed balance of 40 percent of the original cost. It is contended by some respondents that this was excessive, while others assert that it was too low. We do not find persuasive the evidence of interest on investment allegedly earned by car leasing companies, particularly in the absence of information as to the base on which it is earned, the accounting process which produces the asserted rate, and the extent to which an element of profit is contained therein. A most strenuous argument is made, however, that the per diem charge should contain an allowance for what has been referred to as "economic cost." In this respect it is argued that an allowance of 4 percent after taxes on that portion of the original cost of the car representative of the owner's investment of its own funds is inadequate. The cost of this "equity capital" is said to be much higher.

The general funds of the railroad company employed to make the investment in cars, in addition to retained earnings, are derived from long-term debt capital sources and proceeds from the issuance of stock. The cost of long-term debt capital is made up of the average yield, the premium necessary to attract buyers, underwriters' fees and corporation expenses of issuance

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and distribution, less credit for income taxes, expressed as a rate of interest on the principal amount. While we have required to be stricken certain evidence first offered in exceptions, we note that, even if received, it would not warrant a finding that the allowance of 4 percent after taxes is inadequate to cover the costs of this source of corporate funds. A similar calculation of the costs involved in raising capital by issuance of stock, covering the corporation costs of issuance and servicing, underwriters' and brokers' commissions and discounts, and the necessary underpricing, would develop the rate necessary to compensate for this item, but no evidence is of record on this point. For reasons hereinafter mentioned, we are satisfied that costs of this latter type will also be adequately compensated by the allowances herein made.

The substantially higher rate of interest measured by the "cost of equity capital," as this term is used by the proponents, is supported by a theory which was rejected by the examiner as a method appropriate to evaluation of investment choices but inappropriate for application to the per diem calculation. The "cost of equity capital" which we are urged to adopt is not the cost which the railroad must incur to issue and market the stock, but is the interest rate (the cost) which states the discounted cash flow return to stockholders in the form of dividends plus market appreciation, adjusted upward by a factor for underpricing, underwriters' and brokers' commissions, and corporation expenses. This "cost" purports to measure investors' expectations and provide a yardstick by which to measure the utility to the company of future capital investments, in order to hold earnings up to the estimated expectations of investors, thus insuring maintenance of the company's financial standing and ability to obtain future capital inflow at costs acceptable to its particular management. Obviously, this "cost" includes all the profit obtainable or desirable from operations of the capital investment under consideration. There is no evidence that consideration of prospective net per diem revenue is so significant a factor in the financial planning of railroads when considering investment in new freight cars as to require rates generated by the method put described. On the contrary, it must be found that freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the

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decision to acquire cars. We find that the "cost" herein described may not reasonably be employed as part of the ownership cost of per diem cars for purposes of calculating the charges to users.

A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, *supra*. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users.

The average interest rate on outstanding equipment obligations developed by the 1960 studies was 3.849 percent. We agree with the examiner that a rate of 4 percent before taxes is reasonable for application to the portion of original cost of cars herein treated as funds not risked by the car owner and with respect to which the owner has a fixed liability. We find that allowance of 4 percent in this fashion is adequate on the average to reimburse car owners for interest payments which they must make on equipment obligations and constitutes just and reasonable compensation therefor.

The combination of an allowance of 4 percent on 60 percent of the original cost and 9 percent on the remaining 40 percent, produces a composite rate of 6 percent for application to the undepreciated balance of the original cost. A calculation based upon this figure appears subsequently herein as table B, and indicates cost which are closely related to those shown in tables I and II. The abrupt reduction in the 16th year shown in table I is avoided and, while charges are somewhat higher than table II in the earlier years, the speculative impact of the reproduction

cost index in the more distant years is mitigated. We find that an interest rate of 6 percent before taxes upon the undepreciated balance of the original cost of cars is just and reasonable compensation to car owners for all costs of interest on invested and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds, under circumstances where per diem charges are calculated separately with relation to the actual original cost of cars.

COST BRACKETS

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the AAR multilevel rates are challenged as unreasonable both because of their size and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

Value group	Number of cars	Distribution
		Percent
$1,000 and less	380,851	100
1,001 - 2,000	150,160	39.94
2,001 - 3,000	112,112	27.38
3,001 - 4,000	77,716	19.16
4,001 - 5,000	66,406	16.52
		100.00
5,001 - 6,000		
6,001 - 7,000	53,031	24.58
7,001 - 8,000	49,439	22.90
8,001 - 9,000	54,951	25.50
9,001 - 10,000	36,218	16.89
	13,932	10.13
		100.00
	332,140	

and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars.

Another 7-day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 a.m. of the next day following a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car, for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem receivable by type of car, for cars on railroads outside the United States.

In developing the car-day divisor for 1960, the Section of Cost Finding averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year. The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car furnishes a measure of the days, on an average that each car was engaged in revenue producing service but it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users of foreign cars are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order category. Payments are thus made for days excluded in the calculation of the total active car days. Since car owners are users of their own cars and, when in such capacity, should bear the user's share of ownership costs, fairness to all users requires that total ownership costs be

spread over the total days for which payments are or should be made. The 1960 studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio is 1.06263. Application of this ratio to the total active car days of all per diem cars in 1960 produced a car-day divisor of 502,715,000 per diem payable days, or about 306 per diem payable days per car for that year. Development of the car-day divisor in this manner credits all users, including owners when using their own cars, with the same relative proportions of surplus and bad order car days, while excluding the great majority of surplus and bad order car days of cars on home lines. Costs of the home bad order and surplus cars are thus spread over the payments made for the cars in use.

Certain respondents contend that distribution of the annual car costs should be accomplished by use of a car-day divisor developed by application of a fixed ratio of active cars to all cars, and recommend that 80 percent be established as the ratio to be applied. We are satisfied from the record that the car-day divisor is a factor of such significance in the distribution of per diem costs as to require more care in measurement. The determination to be made is the cost per day, to be employed to measure the adequacy of the existing rates and the need for any change. It is essential that the car utilization for the specific years be employed and no sound basis is shown for ignoring it. Its importance is underscored by evidence which indicates that further studies may demonstrate a need for use of different divisors for cars of varying types or values.

The car-day divisor employed in developing the AAR rates has been constructed by multiplying the 20-year average of the annual ratios of active to total cars by the number of days in the year to obtain the active car days per car per year. The figure for active cars has included all cars owned or leased in the year less bad order and surplus cars on lines of owners. For application to the total costs, the active car days per car has been multiplied by the average number of cars in use during the year. Surplus cars, both home and foreign, are based upon estimates of the empty cars on hand at loading stations at the end of each day in excess of the number needed for loading the next day. The portion thereof estimated as being foreign cars is determined, and excluded, by application of a percentage based upon a 7-day test check made in 1956,

the validity of which was not shown. Based upon a test check in 1949, the reported bad order cars are adjusted by a percentage to reflect home cars in this category not reported in regular AAR reports. Accuracy of this adjustment was not shown. The divisor also includes cabooses and other cars not used in per diem service. We find that the procedures used in the 1960 special studies are more reliable and productive of more accurate development of car-day divisors.

The 1960 studies developed the ratio of per diem payable days to total active car days by use of the days for which per diem payments were made for foreign cars. The studies showed that this figure was substantially the same as the total car days of foreign cars, the difference being about four-tenths of 1 percent. We find that the total car days of foreign cars may be employed to determine the ratio of constructive per diem payable days to total active car days of all per diem cars, and that it is unnecessary to develop separately the per diem days paid for foreign cars for this purpose. The total per diem payable days for the year under consideration shall be determined by multiplying the total active home and foreign per diem freight train car days by the ratio which the total foreign per diem car days, both serviceable and unserviceable, bears to the total active foreign per diem car days. The per diem payable days per car to be used as the car-day divisor for the year under consideration shall be determined by dividing the last-mentioned figure by the average number of such cars in service in the year.

The procedures herein prescribed require also the calculation of a car-mile divisor in order to equitably spread the costs attributable to line-haul mileage. The 1960 studies suggest that variations may occur in utilization depending upon the type of car but the evidence of record is not sufficient to support findings with respect thereto. We conclude that, for the present, the average car-mile divisor, based upon the experience of all active per diem cars, must be employed. The respondents may, if they deem it necessary, bring to our attention evidence of a need for separate determination of car-mile or car-day divisors.

The total line-haul car-miles of per diem cars in 1960 developed by the special studies was 21,264,599,477. Divided by the average number of such cars in active service, 1,641,200, indicates an average per car for the year of approximately 13,000 miles. We find that the car-mile divisor applicable to

per diem cars shall be determined for the year under consideration by dividing the total loaded and empty car-miles of per diem freight train cars by the average number of cars in service in the year.

Changes in economic conditions and demands for railroad service produce variations in the number of active car days and average line-haul miles per car from year to year. Since these figures are the divisors which reduce the annual costs to the daily and per-mile rates applied to each car, they are critical to the process with which we are concerned. It is generally accepted that frequent and violent revisions of the per diem rate are not desirable. An important consideration is the fact that while a high rate of economic activity increases the active day and mileage divisors so as to produce a lower rate, a period of recession has the opposite effect. In the latter instance, the divisors might be so reduced as to result temporarily in substantially increased rates, a consequence which is similarly undesirable. Mitigation of such possible extremes is accomplished by using average conditions. The AAR has experimented with the use of 5-, 10-, 15-, and 20-year periods to estimate the car utilization to be anticipated in the future, but there is no evidence that these periods measure the average of current car demand conditions or the norm of economic cycles.

In the light of current conditions and the continuing improvements in railroad operations and equipment, a shorter period should be more reliable and responsive. We find that a 3-year moving average will be adequate to absorb temporary fluctuations in economic conditions while reflecting longer term changes in utilization and costs. It will be employed herein to determine the car-day and car-mile divisors, and the average annual cost of repair and maintenance.

METHOD FOR FUTURE CALCULATION

We find that just and reasonable per diem rates shall hereinafter be calculated in the following manner and subject to the following instructions.

Per diem rates shall be calculated using data for the last calendar year, and for the 3 most recent years as herein prescribed, to develop necessary statistics. Whenever such calculations indicate a need for revision of the rates, the fact shall promptly be brought to the attention of the Commission.

For the purpose of the per diem calculations, freight cars shall be classified according to the original capitalized cost, without allowance for depreciation, subject to the Commission's accounting regulations. Where cars are rebuilt and assigned new car numbers, the original cost shall be the cost as capitalized pursuant to current accounting regulations. Per diem rates shall be so calculated as to reflect differences in the original cost of the car, and differences in the annual ownership costs due to the age of the car in service. Original cost brackets shall be $2,000 in scope, as shown in the following computations (table C). Brackets covering age in service shall be 5 years in scope, as shown in the following computations (table B).

Age in service shall be calculated as follows:

(1) Cars installed prior to July 1 of any given year shall be considered to have commenced their first year in service on the preceding January 1;

(2) Cars installed after June 30 of any given year shall be charged at rates applicable to the first 5 years of service until the expiration of 5 years from the following January 1.

Per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on line, and with respect to the number of miles such cars are moved by users in line-haul service, such calculations to be made in conformance with principles and methods found herein to be just and reasonable. Respondents will be expected to take appropriate action to accurately record days on line and line-haul mileage of foreign per diem cars. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded and payment made for the day of delivery. A road receiving and delivering a car on the same date shall not pay the daily per diem charge for that day but shall pay the appropriate charge for the line-haul mileage.

The rate applicable to each original cost bracket, except the first, shall be that applicable to the middle thousand-dollar figure thereof, herein referred to as the bracket figure, as shown in the tables which follow. The amount of annual depreciation, or recovery of original cost, of cars in each bracket shall be 3 percent of the bracket figure. Forty percent of this annual cost shall be assigned to line-haul mileage, and the remainder to the daily charge (table B).

A fair return on value shall be recovered annually by allowance of interest on invested capital. The total amount, including interest costs on freight car obligations, shall be assigned to time and shall be taken at 6 percent of the average undepreciated balance of the original cost for each 5-year period for which charges are computed (table B).

The total amount recoverable annually on account of property taxes shall be assigned to time. The ratio which all property taxes for the most recent year bears to the total railroad investment for that year shall be employed to estimate this item. The amount shall be determined by application of this ratio to the midyear value based on depreciated original cost for the middle year of each time period (table B).

The total amount recoverable annually on account of repair and maintenance costs shall be taken as the same for all cars and shall be apportioned 50 percent to time and 50 percent to line-haul mileage. All costs which are treated herein as overheads on repair costs shall be apportioned between time and mileage in the same fashion as repair and maintenance costs.

The method employed by the Section of Cost Finding to ascertain repair and maintenance cost in its analysis of 1960 cost data is based upon the most recent information with respect to extent and allocation of the various items and is embodied in summary form in a publication entitled Rail Form H, 7—62, Formula for Use in Determining Per Diem Charges For the Use of Freight-Train Cars. This form, introduced in evidence as exhibit R—5, is available to any interested person through the Bureau of Accounts of the Commission.

Employing data from Rail Form A for the year under study, and ratios and apportionments from the 1960 studies, schedule 1 of Form H separates the annual costs between per diem freight train car ownership costs, other expenses, and general overheads. Footnotes to schedule 1 contain forms to be used to calculate payroll taxes, property tax ratio, cost of handling nonrevenue freight, costs of switching bad order cars, return on investment in property other than freight-train cars, and return on working capital.

Repairs to freight train cars, account No. 314, were apportioned 75.334 percent to ownership costs based primarily on the Forms 2 and 3 studies in 1960. Other 1960 ratios and apportionments to ownership costs in schedule 1 include:

Account No. 302—Repair, shop machinery	34.170%
304—Repair, power plant machinery	22.203%
305(44)—Depreciation, shop machinery	34.170%
305(45)—Depreciation, power plant machinery	22.203%
503—Hire of freight cars (net)	
536—A. R. schedule 376, lines 7, 8, 9, columns c, d, e, f	73.752%
235—Repair, shops and enginehouses	27.317%
253—Repair, power plants	24.645%
257—Repair, power transmission systems	18.722%
266(20)—Depreciation, shops and enginehouses	27.317%
266(29)—Depreciation, power plants	24.646%
266(31)—Depreciation, power transmissions system	18.722%
326—Work equipment repairs	3.057%
328—Miscellaneous equipment repairs	6.551%
507/540—Work equipment rent (net)	3.056%
402—Train supplies and expenses payroll taxes	13.876%
Payroll taxes	8.925%
Property taxes (property other than freight cars)	1.410%

* * * * * * *

Ratio of ton-miles of nonrevenue freight in road service applicable to equipment repair	0.11046
Freight service portion of cost of handling nonrevenue freight used for equipment repair	78.484%
Percent of freight service portion applicable to ownership cost of per diem freight train cars	42.995%
Ratio of return plus Federal income taxes to return excluding Federal income taxes	1.65505
Ratio of revenue freight portion of total freight operating expenses to total freight operating expenses	0.99600
Ratio of switch engine hours switching bad order cars to total switching locomotive hours	0.4408
Percent of cost of switching bad order freight train cars applicable to ownership cost of per diem freight train cars	85.950%
Return on depreciated investment in property other than freight train cars	0.891%
Return on working capital	10.075%

For application to data of years other than 1960, the following changes are made in schedule 1:

In footnote 21, line 5, the source of the ratio is changed to footnote 22, line 8, column (3), and the ratio 1.65505 stricken.

Footnote 23, line 9, column (3) shall contin a source reference which reads "footnote 22, line 9, column (3)," and the ratio 6.620% contained in column (4) is stricken.

Schedule 1 is so designed as to permit the application of ratios and apportionments developed in the 1960 studies to the data of the year under analysis. Many of these ratios and apportionments required extensive reports on the part of all participating railroads and are of such nature as to have a relatively minor effect on the ultimate per diem charges. At the same time, the activities to which they refer are of such nature as to produce substantially similar effects over long periods in the absence of radical changes in railroad operations. We conclude that the ratios and apportionments developed in the 1960 studies, not revised specifically in this report, may appropriately be used for present and future per diem cost calculations but that the respondents may, should they deem it necessary, bring to our attention at any time the need for further studies. Certain ratios are developed from data available from annual reports and use of the Rail Form A formula. No reason appears why these cannot be conveniently recomputed annually without undue effort.

We find that the method of calculating ownership costs for repair and maintenance of per diem freight train cars set forth in schedule 1 of Rail Form H, 7—62, is just and reasonable, and subject to the foregoing qualification respecting future studies, is and will be productive of a fair assignment of such costs as necessary to just compensation of car owners.

The repair and maintenance costs as separated and analyzed in schedule 1 of Rail Form H for each year shall be summarized and separated between mileage and time portions as shown in table A, below. This statistical summary table contains certain additional items which, to the extent not already mentioned, shall be ascertained as set forth below. Where the necessary data are not available through current procedures, additional reports shall be made as prescribed. Appropriate revisions of standard reporting forms will be made as indicated.

(1) The total per diem car days for the study year shall be the average number of per diem freight train cars multiplied by the number of days in that year.

The average number of per diem freight train cars in service, both owned and leased from others, shall be the average of the number of per diem cars reported by class I line-haul railroads in railroad annual report form A, schedule 417, Inventory of Equipment, Freight Train Cars, in service of the respondent at the beginning and the end of the year. Schedule 417 shall be

revised for the reporting of freight train cars by types of car design, distinguished as to those cars that are per diem cars and non-per diem cars in service of the respondent at the beginning and the end of the year, and to include the definition of per diem cars given in item 7(C), below.

(2) The total per diem car days for the study year shall be separated between home per diem cars and foreign per diem cars on the basis of the percentage distribution between home and foreign of the sum of the home per diem cars on line (serviceable plus unserviceable) and the foreign per diem cars on line (serviceable plus unserviceable) using the average of the four quarters of the year as reported on Form OS-C for class I line-haul and switching and terminal companies.

(3) The total active home per diem freight train car days for the study year shall be determined by subtracting from the total home per diem freight train car days the car days in which home cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(4) The total active foreign per diem freight car days for the study year shall be determined by subtracting from the total foreign per diem freight train car days the car days in which foreign cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(5) The total constructive per diem payable days for the study year shall be determined by multiplying the sum of the total active home per diem freight train car days plus the total active foreign per diem freight train car days by the ratio which the total foreign per diem car days (serviceable plus unserviceable) bears to the total active foreign per diem freight train car days.

(6) Quarterly reports of Motive Power and Car Equipment, Form OS-C, filed by class I railroads, including switching and terminal railroad companies, shall be revised to provide for the reporting of serviceable and unserviceable home and foreign freight cars on line separated between per diem cars and non-per diem cars. Form OS-C shall be revised also to provide for reporting surplus per diem freight cars separated between home cars and foreign cars. The instructions to Form OS-C shall be revised to define unserviceable cars and surplus cars and per diem cars as follows:

(A) Unserviceable cars.

Unserviceable cars include cars out of service in connection with repair work. It includes cars being repaired in the shops of car builders, private car lines, and other noncarriers. (For the reporting railroads, it does not include cars which are being repaired in the shops of other railroads). It includes cars on repair tracks repaired and awaiting switching, cars on repair tracks undergoing or awaiting repairs, cars awaiting movement to repair tracks held on bad order storage tracks, cars awaiting movement to repair tracks held in train yard (excluding cars which are to be repaired in train yard without loss of time), cars moving empty in trains en route to shops, cars stored awaiting disposition (not including cars which have been retired from service and written out of ownership).

(B) Surplus per diem cars.

Surplus per diem cars are per diem cars which are in serviceable condition available for loading at the initial count on the last day of the quarter, but which have not been placed for loading within 48 hours. A record shall be made of all such cars on hand at 12:01 a.m. of the day following the last day of each quarter and a count of the same cars made 48 hours later to ascertain those still not placed for loading. The count of surplus cars shall include cars assembled in advance to meet loading requirements of more than 1 day, cars which have not been moved because of infrequent train service as on branch lines, cars set aside or stored for special or future loading such as perishables, grain, autos, rough freight, et cetera, cars stored because of seasonal decline in traffic, as coal cars, ore cars, et cetera. The count of surplus cars shall not include cars out of service in connection with repairs, cars actually moving en route to owners, cars moving on car service order cars in transit to loading points on holding road or to another road. The phrase "placed for loading" refers to: (1) physical switching of a car into position for loading (2) physical switching of a car into possession of a shipper who will subsequently move it to loading position; and (3) physical switching onto tracks at a freighthouse, pier, et cetera, for the purpose of being loaded.

(C) Per diem cars.

As used herein refers to freight cars other than cabooses owned or held under lease arrangement by U. S. class I line-haul railroads, whose interline rental is settled on a per diem basis under the code of per diem rules, or would be so settled if used by another railroad.

(7) Using ratios computed from information reported by class I line-haul and switching and terminal companies in Form OS-C, the average for the four quarters of the study year, the unserviceable per diem car days for the study year and surplus per diem car days for the study year shall be developed as follows:

(A) Unserviceable car days.

The ratio of home unserviceable cars on line to total home cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days computed in accordance with item 1 above to produce the unserviceable

car days of home cars for the study year. The ratio of foreign unserviceable per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days on line developed in accordance with item 1 above to produce the total foreign per diem unserviceable car days for the study year.

(B) Surplus car days.

The ratio of home surplus per diem cars on line to home per diem cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days developed in accordance with item 1 above to produce the surplus car days of home per diem cars for the study year. The ratio of foreign surplus per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable), shall be applied to the total foreign per diem car days developed in accordance with item 1 above to produce the surplus car days of foreign per diem cars for the study year.

(8) Schedule 531, Statistics of Rail-line Operations, railroad annual report form A, shall be revised to require separate reporting of loaded and empty freight car miles of per diem cars in freight trains and passenger trains, and to include the definition of per diem cars given in item 7(C), above. Revisions herein prescribed to various reports shall take effect January 1, 1969.

Until current data is available to calculate the car-mile divisor, it shall be determined in the manner set forth in schedule 3, sheet 1, line 3, column 3, of Rail Form H. This requires the deduction from the annual report car-miles of all cars on class I railroads for the year under consideration of the estimated car-miles of non-per diem cars. The latter figure is estimated by applying to the annual car-miles of non-per diem cars on class I line-haul railroads in 1960, the ratio of car-miles of mileage cars in the year under consideration to the car-miles of mileage cars for the year 1960.

Until current data is available from the reports mentioned above, the car-day divisor shall be determined by the procedure set forth in Rail Form H, schedule 2. The active per diem car days for the year under consideration developed at line 11, part B, thereof, shall be multiplied by the 1960 ratio of per diem days paid for to active foreign per diem car days and the product divided by the average number of per diem freight train cars in service in the year under consideration, developed at line 5, part A.

TABLE A

Statistical and repair summary

Line No.	Item (1)	Source (2)	(3)	Total (3)	Mileage portion 50 percent of column (3) (4)	Time portion 50 percent of column (3) (5)
1	Freight-train car repairs[1]	Rail Form H, schedule 1, sheet 4, line 65, column (5)				
2	Depreciation of freight-train car repair facilities	Rail Form H, schedule 1, sheet 3, line 57, column (5)				
3	Property taxes on car repair facilities	Rail Form H, schedule 1, sheet 3, line 52, column (5)				
4	Payroll taxes	Rail Form H, schedule 1, sheet 3, line 50, column (5)				
5	Return on investment in freight-train car repair facilities	Rail Form H, schedule 1, sheet 4, line 62, column (5)				
6	Return on working capital	Rail Form H, schedule 1, sheet 4, line 63, column (5)				
7	Total ownership repair cost to be apportioned between miles and time	Lines 1 to 6 inclusive				

Line No.	Item (1)	Source (2)	(3)	Total (3)	Home cars (4)	Foreign cars (5)
8	Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (year preceding study year)	19__ Annual Report Form A, schedule 417			XXX	XXX
9	Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (study year)	19__ Annual Report Form A, schedule 417			XXX	XXX
10	Average number of per diem freight-train cars in service, owned and leased from others (study year 19__)	Line 8 plus line 9 divided by 2.0			XXX	XXX
11	Total per diem car days, study year 19__	Line 10 x 365[2]			XXX	XXX
12	Serviceable per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__				
13	Unserviceable per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__				
14	Surplus per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__				
15	Total per diem cars on line end of the quarters study year 19__	Line 12 plus line 13				

See footnotes at end of table

Statistical and repair summary—Continued

Line No.	Item (1)	Source (2)	Total (3)	Home cars (4)	Foreign cars (5)
16	Percentage distribution of per diem cars on line between home and foreign	Line 15	100.000%	%	%
17	Ratio of unserviceable per diem cars on line to total per diem cars on line	Line 13 divided by line 15	xxx		
18	Ratio of surplus per diem on line to total per diem cars on line	Line 14 divided by line 15	xxx		
19	Total per diem car days study year 19__ separated between home and foreign	Line 11, column (3) x line 16			
20	Unserviceable per diem car days study year 19__	Line 17, x line 19	*		
21	Surplus per diem car days study year 19__	Line 18 x line 19	*		
22	Active per diem car days study year 19__	Line 19 minus lines 20 and 21			
23	Ratio total foreign per diem car days to total active foreign per diem car days	Line 19, column (5) divided by line 22, column (5)	xxx	xxx	
24	Total constructive per diem payable days study year 19__	Line 22, column (3) x line 23, column (5)		xxx	xxx
25	Total line-haul car-miles of per diem cars in the United States (loaded plus empty)	Annual report schedule 531		xxx	xxx
26	Constructive per diem payable days per car	Line 24, column (3) divided by line 10, column (3)		xxx	xxx
27	Line-haul car-miles per car	Line 25, column (3) divided by line 10, column (3)		xxx	xxx
28	Average repair cost per car	Line 7, column (4)(5) divided by line 10, column (3)		[3]	[3]

[1]Including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars.

[2]In leap years use 366.

*Cross add for total.

[3]Mileage and time portions of repair cost—50 percent each.

The rates hereinafter prescribed are based upon rail Form H calculations for the years 1963, 1964, and 1965, and the principles mentioned herein. Pending the availability of car-day and car-mile divisors developed currently as described above, these figures must be developed by use of Rail Form H and the ratios developed in the 1960 special studies. Shown below is a summary of the pertinent data.

TABLE A

Composite of statistical and repair summary

Item	1963	1964	1965
Freight train car repairs	$550,322,495	$564,752,370	$562,290,338
Depreciation facilities	8,071,570	8,088,396	8,143,383
Property taxes—facilities	3,385,171	3,257,518	3,323,316
Payroll taxes	27,145,511	28,162,325	29,179,129
Return on investment—repair facilities	11,645,943	10,557,090	10,750,505
Return on working capital	2,665,587	2,750,841	2,946,229
Total	603,236,276	617,568,540	616,632,900
Mileage portion	301,618,138	308,784,270	308,316,450
Time portion	301,618,138	308,784,270	308,316,450
Average number cars in service	1,494,348	1,460,000	1,438,345
Active per diem car days	475,265,360	431,613,831	477,952,280
Per diem payable days	505,031,229	458,645,805	507,886,431
Total line-haul car-miles	21,290,196,857	22,217,341,219	22,981,573,444
Per diem payable days per car	337	346	352
Line haul car-miles per car	14,249	15,218	15,979
Average repair cost per car (50 percent)	201.83	211.49	213.66

	Per diem payable days per car	Line-haul car miles per car	50-percent average repair cost per car
3-year average	345	15,149	$209.00
Property tax ratio-1965	0.01018	----------	----------

TABLE B

Summary of investment costs–per $1,000 original cost

Years in service	Annual charge to depreciation per $1,000 cost[1]	Composite interest on balance[2]	Reimbursement of property taxes[3]	Total columns 2, 3, 4
Group A				
0–5	$30.00	$55.50	$9.42	$94.92
Group B				
6–10	30.00	46.50	7.90	84.40
Group C				
11–15	30.00	37.50	6.38	73.88
Group D				
16–20	30.00	28.50	4.87	63.37
Group E				
21–25	30.00	19.50	3.35	52.85
Group F				
26–30	30.00	10.50	1.85	42.35
Group G				
over 30	xxx	6.00	1.02	7.02

[1]At 3 percent per annum.

[2]At 6.0 percent per annum before taxes on midyear value of middle year of period based on original cost reduced 3 percent per annum.

[3]Taken at 1965 figure of 0.01018 multiplied by midyear value of car for middle year of period based on original cost reduced 3 percent per annum.

We find that the rates set forth in table C, below, are based on conservative estimates of cost, are just and reasonable and will provide just and reasonable compensation to car owners for the future, and that such rates shall be assessed and paid by all respondent carriers, subject to the act from and after the effective date of our order herein.

RATE TABLE C

Line No.	Cost Bracket (1)	Mileage charges: Annual reduction in car value[1] (2)	Mileage charges: Annual repair and maintenance[2] (3)	Mileage charges: Total mileage cost[3] (4)	Mileage charges: Charge per line-haul mile[4] (5)	Time charges: Group A 0—5 years: Annual[5] (6)	Time charges: Group A 0—5 years: Daily[6] (7)	Time charges: Group B 6—10 years: Annual[5] (8)	Time charges: Group B 6—10 years: Daily[6] (9)
1	$0-1,000	$12	$209.00	$221.00	1.47¢	291.92	$0.85	281.40	0.82
2	1-3,000	24	209.00	236.00	1.57¢	374.84	1.09	353.80	1.03
3	3-5,000	48	209.00	257.00	1.71¢	540.68	1.57	498.60	1.45
4	5-7,000	72	209.00	281.00	1.87¢	706.52	2.05	643.40	1.86
5	7-9,000	96	209.00	305.00	2.03¢	872.36	2.53	788.20	2.28
6	9-11,000	120	209.00	329.00	2.19¢	1,038.20	3.01	933.00	2.70
7	11-13,000	144	209.00	353.00	2.35¢	1,204.04	3.49	1,077.80	3.12
8	13-15,000	168	209.00	377.00	2.51¢	1,369.88	3.97	1,222.60	3.54
9	15-17,000	192	209.00	401.00	2.67¢	1,535.72	4.45	1,367.40	3.96
10	17-19,000	216	209.00	425.00	2.83¢	1,701.56	4.93	1,512.20	4.38
11	19-21,000	240	209.00	449.00	2.99¢	1,867.40	5.41	1,657.00	4.80
12	21-23,000	264	209.00	473.00	3.15¢	2,033.24	5.89	1,801.80	5.22
13	23-25,000	288	209.00	497.00	3.31¢	2,199.04	6.37	1,946.60	5.64
14	25-27,000	312	209.00	521.00	3.47¢	2,364.92	6.85	2,091.40	6.06
15	27-29,000	336	209.00	545.00	3.63¢	2,530.76	7.34	2,236.20	6.48
16	29-31,000	360	209.00	569.00	3.80¢	2,696.60	7.82	2,381.00	6.90
17	31-33,000	384	209.00	593.00	3.95¢	2,862.44	8.30	2,525.80	7.32
18	33-35,000	408	209.00	617.00	4.11¢	3,028.28	8.78	2,670.60	7.74
19	35-37,000	432	209.00	641.00	4.27¢	3,194.12	9.26	2,815.40	8.16
20	37-39,000	456	209.00	665.00	4.43¢	3,359.96	9.74	2,960.20	8.58
21	39-41,000	480	209.00	689.00	4.60¢	3,525.80	10.22	3,105.00	9.00

See footnotes at end of table

Time charges—*Continued*

Line No.	Cost bracket	Group C 11-15 years		Group D 16—20 years		Group E 21—25 years		Group F 26—30 years		Group G over 30 years	
		Annual[5] (10)	Daily[6] (11)	Annual[5] (12)	Daily[6] (13)	Annual[5] (14)	Daily[6] (15)	Annual[5] (16)	Daily[6] (17)	Annual[5] (18)	Daily[6] (19)
1	$0-1,000	270.88	0.79	260.37	0.75	249.85	0.72	239.35	0.69	216.02	0.63
2	1-3,000	332.76	0.96	311.74	0.90	290.70	0.84	269.70	0.78	223.04	0.65
3	3-5,000	456.52	1.32	414.48	1.20	372.40	1.08	330.40	0.96	237.08	0.69
4	5-7,000	580.28	1.68	517.22	1.50	454.10	1.32	391.10	1.13	251.12	0.73
5	7-9,000	704.04	2.04	619.96	1.80	535.80	1.55	451.80	1.31	265.16	0.77
6	9-11,000	827.80	2.40	722.70	2.09	617.50	1.79	512.50	1.49	279.20	0.81
7	11-13,000	951.56	2.76	825.44	2.39	699.20	2.03	573.20	1.66	293.24	0.85
8	13-15,000	1,075.32	3.12	928.18	2.69	780.90	2.26	633.90	1.84	307.28	0.89
9	15-17,000	1,199.08	3.48	1,030.92	2.99	862.60	2.50	694.60	2.01	321.32	0.93
10	17-19,000	1,322.84	3.83	1,133.66	3.29	944.30	2.74	755.30	2.19	335.36	0.97
11	19-21,000	1,446.60	4.19	1,236.40	3.58	1,026.00	2.97	816.00	2.37	349.40	1.01
12	21-23,000	1,570.36	4.55	1,339.14	3.88	1,107.70	3.21	876.70	2.54	363.44	1.05
13	23-25,000	1,694.12	4.91	1,441.88	4.18	1,189.40	3.45	937.40	2.72	377.48	1.09
14	25-27,000	1,817.88	5.27	1,544.62	4.48	1,271.10	3.68	998.10	2.89	391.52	1.13
15	27-29,000	1,941.64	5.63	1,647.36	4.77	1,352.80	3.92	1,058.80	3.07	405.56	1.17
16	29-31,000	2,065.40	5.99	1,750.10	5.07	1,434.50	4.16	1,119.50	3.24	419.60	1.22
17	31-33,000	2,189.16	6.35	1,852.84	5.37	1,516.20	4.39	1,180.20	3.42	433.64	1.26
18	33-35,000	2,312.92	6.70	1,955.58	5.67	1,597.90	4.63	1,240.90	3.60	447.68	1.30
19	35-37,000	2,436.68	7.06	2,058.32	5.97	1,679.60	4.87	1,301.60	3.77	461.72	1.34
20	37-39,000	2,560.44	7.42	2,161.06	6.26	1,761.30	5.11	1,362.30	3.95	475.76	1.38
21	39-41,000	2,684.20	7.78	2,263.80	6.56	1,843.00	5.34	1,423.00	4.12	489.80	1.42

[1]Forty percent of annual reduction in value (depreciation).

[2]Statistical summary—line 28, column 4.— 3-year average—see table A.

[3]Column 2 + column 3.

[4]Column 4 divided by car-mile divisor—statistical summary, line 27, column 3.—3-year average (15,000) see table A.

[5]Tax and investment costs for group and cost bracket (table B, column 5) less column 2 plus time portion of 3-year average repair and maintenance cost (statistical summary, line 28, column 5)—see table A.

[6]Annual time cost divided by car day divisor (statistical summary, line 26, column 3)—3-year average (345[d]) see table A.

DOCKET NO. 31358

In docket No. 31358, the complainants seek a finding by the Commission that the AAR per diem rates charged since March 1951 were just, reasonable, and otherwise lawful, and that payments at lesser rates have been, are, and would be unjust, unreasonable, and noncompensatory, in violation of section 1 of the Interstate Commerce Act. As a result of subsequent amendments to the complaint in this case, it now embraces all past rates, including the multilevel rates. The circumstances involved in this dispute were fully described in the prior report of the Commission, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co., supra.* In that report, decided October 17, 1955, it was found that the rates charged up to that time were not in excess of reasonable compensation during the periods in which they were effective, and that the then existing rate of $2.40 was not in excess of reasonable compensation for present use. Upon appeal by the defendants, a three-judge United States District Court set aside the order of the Commission discontinuing the proceeding and remanded it for further consideration. *Boston & Maine Railroad* v. *United States, supra.* An appeal to the United States Supreme Court was dismissed. *Boston & Maine Railroad* v. *United States, supra.*

As heretofore described, a number of the complainants commenced civil actions before the United States District Court for the Southern District of New York, seeking judgments for damages against the defendants for the balance of per diem payments alleged to be due and unpaid. The court in those cases found generally for the complainants, but deferred decision as to the amount of damages pending the final determination of the issues in docket No. 31358. Pursuant to the order of the court, certain of the parties to the civil suits sought and obtained permission to intervene in docket No. 31358, and appropriate amendments to the complaint in that proceeding were made, requesting the Commission, without regard to the proceeding pending in docket No. 33145, to advise the court what per diem rate was just, fair, reasonable and nondiscriminatory for each month beginning with August 1953, to the date of the order of the court, i.e., June 15, 1962. A certified copy of the order was required to be filed with the Commission, which specifically requested its cooperation and advice as described above. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co., supra.* Similar advices are desired by the Supreme Court of the

State of New York, County of New York, in connection with the disposition of suits brought by the Boston & Maine and New Haven Railroad against the Illinois Central Railroad to recover interline freight balances, in which the defendant counterclaimed for balances under per diem claims.

In giving further consideration to the issues in docket No. 31358, certain questions raised on remand require attention. In 1951, the AAR subcommittee on mileage and per diem recommended that account No. 314, the major repair account, be subdivided to record separately the repair costs for home cars, foreign cars, railroad and privately owned mileage cars, and cabooses; that classified repairs, running repairs, switching expenses and credits for sales of scrap be shown separately; and that car repairs for cabooses be eliminated from account No. 314 and caboose-car days eliminated from the freight-car day divisor. In remanding the case, the court expressed the view that the Commission should not have rejected the recommendation without a more thorough investigation and analysis.

Concededly, the multitudinous cost items entered in account No. 314 over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Section of Cost Finding in 1960 dealt with several separations, however, and the analysis based thereon took into consideration such of these factors as were considered significant. The recorded totals of the past accounts can be separated, therefore, by use of the ratios derived from the 1960 studies.. The findings which follow include this procedure.

The court also expressed doubt as to the validity of car-day divisors which were based upon average utilizations for the past 20 years, the period having been chosen with reference to the average age of cars then in service. There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the costs incurred in that period be employed, but also the active car days for that same period. Since our consideration in docket No. 31358 is of past years, we have no need to attempt an approximation of utilization to be anticipated in the future and may employ, to the extent permitted by available statistics, the car days for the years in issue.

Remand of docket No. 31358 by the United States District Court was due to the conclusion of the court that consideration should have been given to car mileage and the fair distribution of per diem

costs among car users. We have found that the substantial difference in use of cars measured by line-haul mileage requires that it be reflected in the distribution of per diem costs in the future. No records are available, however, with which to determine the actual mileages of foreign per diem cars during the past periods when the challenged rates were in effect.

A method of estimating an appropriate rate for past years which took into account a charge based on mileage was suggested by the Section of Cost Finding and a generally similar method was used by the examiner to calculate rates which he found reasonable for past years. Both methods require certain assumptions which are not sufficiently supported by the record. After assigning the total annual costs for the year 1960 between time and mileage, each estimates the per-mile and per-day cost. For each carrier the per-mile cost is multiplied by its 1960 line-haul mileage of foreign cars and divided by its per diem days paid for to produce a daily figure which, when added to an individually adjusted per-day cost, constitutes the rate estimated as proper to be paid by that carrier. Necessarily, a different rate is produced for each carrier.

To estimate a similar rate for each carrier for years other than 1960, the examiner determined the ratio which the 1960 rate bore to the 1960 average rate calculated on a time-only basis, and applied this to the average, time-only rates which he found to be reasonable for each of the past periods during which the AAR rates were in effect. The Section of Cost Finding method employed the ratio which the individual carriers' time-mile rate in 1960 bore to the overall time-mile rate of all carriers in that year, applying it to a separately estimated overall time-mile rate for the year under consideration. There is some evidence that the ratio of per diem days paid for by individual railroads in 1960 to the total of all carriers is substantially similar to the ratio in other years in issue, but a similar relationship has not been proven with respect to the mileage of foreign cars on individual lines. While many of the ratios developed in the 1960 studies, particularly those in schedule 1 of Rail Form H underlying the estimation of ownership repair costs, would not change appreciably from year to year, this is not true with respect to the ratios necessarily employed in estimating these time-mileage rates for individual carriers. It cannot be found that 1960 was so nearly representative of conditions prevailing throughout all the other years in issue with respect to car mileage on a carrier-by-

carrier basis as to justify reliance on these ratios in making determinations upon which monetary judgments depend.

We find that no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960. The reasonableness of rates assessed in past years must be measured by their application on a daily basis.

As a result of the complaint filed on September 21, 1953, the decision by the commission in the title proceeding on October 19, 1955, and our decision in *Alabama T. & N. R. Co. v. Aberdeen & R. R. Co., supra*, the use of reproduction cost as the base for calculation of charges to depreciation and interest was approved. In neither of those cases did the record contain the extensive special studies and data now available for our consideration. In 1949 and in 1955, the daily rate based upon the average depreciation and interest cost of all cars was clearly insufficient to cover the particular costs of many of the new cars then being built. The greater desirability of the new cars apparently resulted in greater use being made of them by foreign lines, either pursuant to or in violation of car service rules. As to these particular cars, owners did not receive just and reasonable compensation under rates fixed by the average costs of all cars. At the same time, to the extent that the older cars were used, the amounts received by owners exceeded the necessary compensation.

Calculation of rates using reproduction cost as a base represented an attempt to compensate for this situation. The extent to which the respondents actually suffered a net deficiency in compensation as a result of undercompensation on new cars not by overcompensation on old cars has not been established.[26] Where a single average daily rate is employed, it cannot be judged with reference to the cost of particular cars. It must be measured with reference to the total costs of all cars. The increase in the per diem rates due to use of reproduction cost resulted in only a few of the new cars receiving per diem payments which met their particular costs. Thus, of the 974,386 cars sampled in 1961, there were 643,123, or about two-thirds, which had depreciated original cost of less than $3,000; 331,263

[26] On December 31, 1961, a sampling of 974,386 per diem cars out of a total of about 1,600,000 cars indicated that about two-thirds had depreciated original costs lower than the fleet average and would have received excess compensation at the average rate.

had depreciated original costs over $3,000. With rates based upon original cost, about one-third of the per diem fleet would consist of cars which would not receive payments equivalent to their costs. Two-thirds would receive payments in excess of their costs. Use of reproduction cost increased the average depreciated cost to $4,200 which still left over 20 percent of the fleet undercompensated. At the same time, the latter method increased the depreciation and interest charged to the fleet as a whole by approximately $330,500,000, equivalent to over 60 cents per day on each car.

Consideration has already been given to the use of reproduction cost as a base for calculation of per diem rates and to the extent to which fairness to owners requires recognition of decreases in the purchasing power of the dollar. As heretofore pointed out, the use of a charge to depreciation based upon reproduction cost of the car provides a measure of the owner's capital cost burden *only* if it has paid the full purchase price itself. In fact, a substantial portion of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. It is proper to allow for inflation with respect to that portion of the average original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that such allowance applied to 40 percent of the annual depreciation charge on the average original cost makes adequate provision for compensation to owners for this element of the ownership burden. No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculation for rates in prior years.

Upon further consideration we find that the use of average reproduction cost of all cars has not been shown to be just and reasonable or productive of just and reasonable compensation to car owners. We are persuaded, however, that under a single average rate, car owners do incur some loss of just compensation due to greater than average use being made of newer cars, and in the rates hereinafter found to be just and reasonable we have included provision therefor.

None of the AAR calculations is based upon data for the years in which the rate actually was applied. Thus the $2.40 rate which was in effect from August 1, 1953 to January 1, 1957, was

based upon statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The allowances for depreciation and interest on cars and facilities increased these figures approximately $200 million over original cost figures. About 1 1/3 cents per day were added to allow for 1953 increased wage and material costs.

The $2.75 rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the 12 months ending June 30, 1956. These indicated a cost for repairs and associated maintenance items of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was increased by 9.41 cents to allow for labor, material and tax increases, resulting in a total of 276.96 cents, which was rounded to the $2.75 rate.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation was based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation.

The $2.88 rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A 5-year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in

freight cars and repair facilities, based on reproduction costs, was 85.737. cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893 cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

The rates for the several brackets under the new multilevel system which became effective January 1, 1964, are supported by an AAR study using 1961 costs which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing 3 percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking 6 percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account No. 314 repair costs to be anticipated were estimated by using the average of such costs for the 5-year period, 1957-1961, and a car utilization factor of 91.87, or 335.33 days, was assumed, based upon the average of the 20-year period, 1942 through 1961.

Both the Section of Cost Finding calculations and those made by the AAR in support of the rates prior to 1964 purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation and Depreciation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Section

of Cost Finding calculations employ the Annual Report data for charges to depreciation plus an allowance for assumed depreciation on fully depreciated cars. These are based upon original costs. In place of using a depreciation charge for cars leased from nonrailroad owners, the Section of Cost Finding method includes the payments made to such owners as shown in the annual reports, with minor adjustments. Where a single average rate is being calculated for all cars, the method used by the Section of Cost Finding appears the more accurate.

Prior to the calculations underlying the $2.88 rate, account No. 314 repair costs had been estimated by the AAR using the costs of the latest available year. Beginning with that rate, and again in calculations underlying the multilevel rates, the average of account No. 314 costs for the last 5 years, adjusted to current levels, was employed. The record demonstrates that account No. 314 is subject to annual fluctuation of as much as 20 percent. The 1954-58 adjusted account No. 314 average as computed by the AAR and employed in calculations underlying the $2.88 rate which became effective December 1, 1959, was $590,045,295. The actual amount subsequently developed by the AAR for 1959 was $516,023,831, and for 1960, the first full year in which the rate applied, the actual amount was $488,898,352. In 1961 the figure dropped to $438,620,793.

The AAR estimated the deadhead haul cost of repair material, referred to by the Section of Cost Finding as nonrevenue freight, by taking 6.06 percent of the total of the material proportion of the freight car repair proportion of general expense, maintenance of shop and equipment accounts, and the material portion assigned from account No. 314. The percentage was based upon a study made in connection with *Rules for Car-Hire Settlement, supra,* while apportionment of the various accounts was based on studies made in 1956.[27] The Section of Cost Finding analyzed the 1960 Annual Report accounts to isolate expenses applicable to nonrevenue freight. From the special studies, ratios were developed to estimate the ton-miles of nonrevenue freight applicable to equipment repairs, and the consequent cost. Further analysis of repair accounts in the Annual Reports developed the separation of this amount between ownership costs of per diem cars, and other costs.

[27] The case cited was decided January 7, 1930 and the study was between 20 and 30 years old during the period it was used by the AAR for the calculation of rates here in issue.

Adjustments used by the AAR to account No. 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the 12 months ending June 30, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of account No. 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total account No. 314.

The Section of Cost Finding analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Section of Cost Finding studies in 1960 indicated that 45 percent should be so assigned.

Deductions made by the AAR from account No. 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its own car. The cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of account No. 314 total repair costs arose from this source.

While the Section of Cost Finding analysis covers about 2 1/2 percent less cars than those included by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to account No. 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. The Section of Cost Finding analysis for 1960

added the equivalent of 14.7 percent of account No. 314 for this item. The remainder of the excess of these calculations arises from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads on the latter two. The content and method of evaluation of the questionnaires relied upon by the AAR are not of record. In view of the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, et cetera, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies.

To develop car-day divisors, the AAR totaled the freight cars owned or leased at the end of each year for the preceding 20 years, and subtracted therefrom the total average number of home bad order and surplus cars for the same years. The ratio of the resulting figure to the total number of cars was then multiplied by 365 to determine the active car days per car. The figures included cabooses and other cars not used in per diem service but, to an indeterminate extent, any inaccuracy resulting therefrom was offset by the inclusion of the costs attributable to the additional cars.

The deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on form CS-60 the home per diem cars out of service for this cause. A test in September 1956, indicated that these reports were understated by 23.4 percent. In subsequent per diem cost calculations the reported totals were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on form CS-44, the number of surplus cars on hand, both home and foreign. A 1-week test in February 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Section of Cost Finding studies.

The Section of Cost Finding studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next day's loading. It is a figure which the AAR witness conceded was not very accurate, and was generally understated, particularly in periods of car shortage.

The validity of the AAR cost calculations, and the questionnaire data employed, were challenged on a number of grounds. In his report the examiner made a number of revisions of the AAR calculations to conform to the principles which he found applicable. On exceptions, the revisions to the AAR calculations are challenged in several respects while other parties criticize the absence of revisions which they espouse. Upon consideration of the entire record, we conclude that the past AAR calculations are based upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past per diem costs. We find that the complainants in docket No. 31358 have failed to sustain their burden of proving that the rates in issue are just, reasonable, and nondiscriminatory for use in the determination of per diem charges with respect to the defendants.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate calculations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. Summary T-1 of Rail Form H provides a method of deriving a single average daily per diem cost applicable to all cars for years other than 1960, making use of the ratios and apportionments developed through the 1960 studies.

We have found that car owners will receive a fair return on the value of their investment in freight cars under a multilevel system by allowance of interest at 9 percent before taxes on 40 percent of original cost and 4 percent before taxes on 60 percent of original cost. Under that system, the allowance for depreciation of each car is related closely to its actual annual loss in value. When a single average rate is applied to all cars, having appreciably different original costs, compensation to

individual owners, or for particular cars, may not be as complete. This is an inevitable consequence of averaging. Insofar as rates for the past are concerned, the record permits only the latter method and our findings, made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York, are on this basis.

As noted above, we are satisfied that strict adherence to the interest rates just mentioned will not compensate owners for the consequences of excess use of higher cost cars when a single average rate is used, but that application of the account No. 53 Index of freight car costs to the depreciation and interest base is improper. Summary T-1 of Rail Form H, however, includes an allowance for interest before taxes which results in an after tax return of 4 percent on the total original cost. The net effect is to allow car owners interest on the 40 percent investment in excess of 10 percent before taxes, while retaining a return of 3.849 percent before taxes to meet average interest costs of borrowed funds. This cost analysis also allows car owners substantial sums as depreciation charges on cars which had been fully depreciated under accelerated schedules pursuant to the defense amortization program prior to the period covered by the present dispute. We find that determination of just, reasonable, and nondiscriminatory rates for the past for the settlement of per diem balances between the plaintiffs and the defendants in docket No. 31358, can most effectively be accomplished by application of the cost analysis designated as Summary T-1 of Rail Form H, using the ratios and apportionments developed by the 1960 special studies. The summary calculations from Rail Form H, using the methods herein approved, for each year from 1953 through 1965, inclusive, are shown in the appendix to this report.

The defendants in docket No. 31358 contend that we should calculate and deduct from the per diem charges for the past years amounts which represent ownership repairs made by them and not reimbursed pursuant to AAR rules. We have heretofore expressed our view that the calculation of ownership costs and consequent per diem rates must include all costs properly attributable to the repair and maintenance of the cars. As amended, the complaint seeks specific findings as to the just and reasonable rates, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. The per diem rate which is fair and reasonable must be measured by an equitable distribution of total ownership burden. It exists

independently of alleged offsets and must be found without reference to them.

Upon consideration of the record herein, we find that the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits herein before described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, inclusive are as shown below. The fluctuations in rates from year to year result from changes in economic activity and consequently the extent to which cars are utilized.

Year	*Rate Per Day*
1953	$2.12
1954	2.37
1955	1.92
1956	1.96
1957	2.12
1958	2.60
1959	2.44
1960	2.50
1961	2.58
1962	2.76
1963	2.50
1964	2.69
1965	2.85

Our conclusions with respect to the present multilevel rates bar any attempt to furnish advice as to just and reasonable rates for the past on a multilevel basis. Available information limits our findings to the single, average rates shown above. Just and reasonable rates for years subsequent to 1965 may be calculated in the same manner as heretofore set forth.

Insofar as the rates approved here for the future are concerned, the respondents will be expected to give them a fair opportunity, through practical application. Proceedings such as those here presented are primarily in the nature of contractural disputes solely between carriers where settlements should be encouraged. After giving such rates a fair opportunity, the respondents will be expected to attempt first to reconcile any differences and reach

some agreement before calling upon the Commission to modify the rates prescribed, particularly since the underlying facts are within the carriers' own knowledge and control.

There is a clear distinction between the provisions of section 1(14)(a) herein applied and the recently confirmed statutory authority embodied in the new provisions enacted by the Congress. The former provisions, as interpreted by the courts, limit our powers to determining compensation (*basic* per diem) based strictly upon cost considerations. On the other hand, the latter provisions that empower us to set so-called incentive rates, which are obviously something above and beyond the regular or basic compensation, permit us to consider and give effect to factors other than costs, such as the need for encouraging the construction of new cars and for the general replenishing of the car fleet. While the incentive provisions are not involved in the instant proceedings and cannot be considered on this record, in other proceedings currently pending at various stages of administrative process, the Commission is moving toward determination of whether or not incentive rates should be established and the attendant question of modification of our present car service rules.

SUMMARY OF PRINCIPAL FINDINGS AND CONCLUSIONS

To recapitulate our findings and conclusions with respect to the principal matters in issue, upon consideration of the entire record herein, we find:

1. That in docket No. 31358 the per diem rates charged pursuant to the agreement, *Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage—Agreement,* approved August 28, 1950, from and after August 1, 1953, have not been shown to be just, fair, reasonable and nondiscriminatory;

2. That in docket No. 31358, the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits hereinbefore described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, are those set forth above, and that the just, fair, reasonable, and nondiscriminatory rates for these purposes for the period subsequent to January 1, 1966, until the effective date of the rates herein prescribed shall be

ascertained by the methods employed herein to calculate the rates found reasonable for the prior years;

3. That the performance of orderly and efficient transportation service by rail in the future requires the uniform observance of per diem charges by all railroads and the prescription of such uniform charges by this Commission pursuant to the authority contained in section 1(14)(a) of the Interstate Commerce Act;

4. That reasonable compensation to owners of freight cars in per diem service requires an appropriate allowance for the impact of inflation upon the funds invested by them, and that allowance of 40 percent of the original cost of freight cars as that portion fairly representative of the average owner's investment, and the allowance of a return of 9 percent interest before income tax upon such amount provides reasonable compensation therefor and includes a fair return upon the value of their investment;

5. That reasonable compensation to owners of freight cars in per diem service requires the calculation of ownership costs as provided hereinbefore, including prescription of a method of allocating and computing costs of repair and maintenance, taxes, and capital investment;

6. That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved;

7. That the cost of repair and maintenance of freight cars should be distributed between time and mileage, one-half to each, and that the reduction in value of cars resulting from their employment in transportation service should be spread over a period of 30 years, allowing 3 percent of the original cost per year therefor, and distributing the annual amount 40 percent to mileage and 60 percent to time, as the causal factors therefor;

8. That reasonable compensation to car owners requires that ownership costs be closely related to the original cost of cars and that rates productive of such compensation vary within original cost brackets no more than $2,000 in scope;

9. That adjustments to the calculated costs of car ownership to reflect alleged deficiencies in the schedules of payments used by railroads to reimburse each other for repairs made to cars of each other would not result in reasonable compensation to car owners; and

10. That reasonable compensation to car owners requires the payment by all railroads of the time and mileage rates set forth in table C, *supra*, from and after the effective date of the order in docket No. 33145.

Commissioner Walrath, being necessarily absent, did not participate.

It is ordered, That the proceeding in docket No. 31358 be, and it is hereby, discontinued.

It is further ordered, That the complaint in docket No. 34405, except to the extent to which the relief sought has been granted by order in docket No. 33145, be, and it is hereby, dismissed.

It is further ordered, That on and after October 1, 1968 the respondents in docket No. 33145 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate table C, in this report; that this order shall continue in force and effect until the further order of the Commission; and that the charges herein provided shall be paid for each day foreign cars are held but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts;

And it is further ordered, That the order of the Commission dated October 5, 1962, which required respondents in docket No. 33145 to preserve all records, data and information underlying the reports filed by them in connection with said proceeding until further order, be, and it is hereby, canceled.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

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APPENDIX

Pertinent portions of the report recommended by Hearing Examiner Robert C. Bamford

Cost Section Studies

To facilitate the investigation in docket No. 33145, the Commission incorporated in the order of investigation an order under section 20 of the act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal prehearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebutatl statements. After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways, were required to complete only forms 1, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.

1 — Special Study of Freight-train Car-miles and Car days.

R-1A— Report of Per Diem Days and Payments.

2 — Special Study of Amounts charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.

3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.

4 — Summary of Special Study of Work of Freight-train Car Inspectors.

5 — Separation of Account 314—Freight-train Cars—Repairs.

6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest thereon, Applicable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.

7A — Special Study of Switch Engine-Hours Applicable to Freight-train Car Repairs.

7B — Non-revenue Freight Used in Equipment Repairs.

7C — Maintenance of Power Facilities for the Year 1960.

7D — Analysis of Certain Items Reported in Annual Report, Schedule 376—Hire of Freight Cars, for the Year 1960.

7E — Maintenance of Work Equipment.

7F — Maintenance of Miscellaneous Equipment.

8 — Taxes Applicable to Freight-train Car Ownership.

9 — Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.

10 — Survey of Car Accounting Methods.

11 — Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, trainyards, or railroad offices, located in 29 different States. Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an industry advisory committee on per diem costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.

The special studies were accomplished, and reported on the prescribed forms, by 104 class I line-haul railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

Class II line-haul railroads	72
Class I switching and terminal companies	27
Class II switching and terminal companies	45
Line-haul electric railways	3
Other electric railways	3
Total short lines	155
Class I line-haul railroads	104
Total reporting roads	259

From the information received as a result of these special studies, and the annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1,

[14] This formula is designated by the Cost Section as Rail Form H. No. 7-62, *Formula for Use in Determining Per Diem Charges for the Use of Freight-train Cars*. It will be referred to hereinafter as Form H.

Summary MT-1, MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.903 cents per car per day.[16] This summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 41.417 cents per day.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car-mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain

[15] The cost analyses supporting these summaries are also contained in the exhibits of the Cost Section.

[16] The methods used by the Cost Section to reduce annual costs to daily costs are set forth in more detail in discussing issues connected therewith.

car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both summaries T-1 and MT-1 employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the class I line-haul railroads separately, and for class II roads by groups, as well as individually for the defendant railroads in docket No. 31358 and for the various different groups of reporting railroads in the special study program. In this summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the average mileage over which they move such cars. It differs from summary T-1 in that while still designed to return to car owners their full costs of ownership, it refines the data so as to reflect differences between using lines measured by the use they make of the cars. Thus, for each railroad in this summary, the mileage cost developed in MT-1 is multiplied by the 1960 line-haul and equated switching car-miles of foreign per diem cars on the particular carrier, and the result divided by the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car

day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, for which the computation was made. The unit cost for all United States railroads computed by the method in MT-2, which is comparable to the unit cost of 249.903 cents per day in summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained by the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 149 cents. The mileage cost of 2.323 cents developed in summary MT-1 is applied to line-haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles traveled by it.

At the hearings it appeared that other factors, such as the age, value, or type of car, might deserve consideration. As a result, the Cost Section, utilizing the data and com-

putations heretofore described, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing costs using each of the formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, et cetera, by value of car, it was assumed that all costs other than depreciation and return would remain the same regardless of the value or age of the car. For convenience of comparison, the value brackets used in this computation are the same as employed in the AAR multilevel rates now in effect. Issues concerning the details and results of the Cost Section studies are considered subsequently in this report.

AAR CALCULATIONS

Per diem calculations by the AAR staff during the past 15 years have followed the same general pattern but have differed in their details with respect to each rate. Cost statistics for a recent 12-month period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, et cetera, interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car-day divisor to develop a unit cost per day, and the results totaled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, et cetera, leaving to the

general committee and the board of directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car-day divisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produced a figure referred to as "active car days per car per year"; which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from 5 to 15 years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding 20-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting the $2.75 and earlier rates. In the calculations supporting the $2.88 and multilevel rates, the repair expenses for the most recent 5-year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight-line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multilevel rates used a flat 3 percent rather than the average of 3.06 percent. Beginning with the calculations supporting the $2.40 rate,

[18] The calculations supporting the $2.88 and multilevel rates differed in that two car-day divisors were employed. The total cars at the end of the year was employed to calculate unit cost of depreciation and interest on freight cars while the average of the cars in use at the beginning and end of the year was used for all other costs.

reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, et cetera, has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction costs basis was employed.

Interest on investment has been calculated at 6 percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.50 rate the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

In developing the multilevel rates, the AAR staff calculated the annual costs per car for all items mentioned above except interest and depreciation on freight cars. The latter were separately calculated with respect to each of the value brackets, using reproduction cost as a base. Inauguration of rates graduated according to the value of the car imposed substantial changes in the system which had theretofore prevailed in accounting for the compensation payments. With a single rate applicable to all cars, carriers had only to determine from the junction reports, showing when cars were received and delivered to each carrier, the total number of days per diem to be multiplied by the rate. It is now necessary to determine the number of days for each car and the rate bracket applicable to that car, calculating charges on each car separately.

Administration of the multilevel rate system was established by the organization of a control center within the Operating Transportation Division of the Association of American Railroads. On March 29, 1963, the board of directors of the AAR authorized an appropriation for

this purpose, to acquire office space, equipment, data processing machinery and necessary employees. The first instructions to all United States, Canadian and Mexican railroads were sent out on May 6, 1963, and revised on June 25, 1963. They included forms for reporting all cars at their original cost, and the amounts of additives to those costs, if any, together with sundry information including the year installed, whether new, rebuilt, or second-hand, AAR mechanical designation, et cetera. A table was included from which the multilevel rate applicable to each car could be ascertained. A standard punch card method of reporting the same data was provided for car owners having the equipment for this purpose. Where owners reported on the forms, the cards were punched at the control center.

All railroads had reported, as requested, by the latter part of September 1963 and a preliminary master list of all per diem cars was distributed to all railroads on October 10, 1963, listing 1,786,414 cars in alphabetic code, mechanical designation and car series order. Also distributed on that date was a preliminary alternate master list covering the same cars, but listed without regard to mechanical designation. To the railroads submitting requests therefor, there was distributed the same data on magnetic tapes and on master series decks of cards, for use in appropriate data processing machines. Between September and December 31, 1963, numerous corrections to the reports were submitted by the railroads, caused by cars retired and installed, and changes in mechanical designation, and changes in valuation. All were processed through the end of the year and, on January 15, 1964, master list No. 1 and alternate master list No. 1, in written as well as magnetic tape and punch card form, were distributed. The function of the control center thereafter was, and will continue to be, the processing of reported

changes in cars and the monthly publication of corrections to the master list. The first three such publications in 1964 contained, on an average, about 5,000 changes each.

In choosing a rate to be submitted to the members of the per diem agreement for vote, the AAR officials customarily have considered the various calculations received from the staff, on occasion revised them in some respect, and rounded off the results to produce an even number of cents per day. Thus, calculations of $2.76961 and $2.87940 were rounded to $2.75 and 2.88. While the validity of the calculations used in ascertaining the costs have been challenged in these proceedings, it is clear that the AAR rates have purported to do no more than equate the daily ownership costs of freight cars in per diem service.

* * *

Assignment of cars to appropriate brackets is accomplished on the basis of their depreciated original cost plus additions and betterments. When cars were built in their own shops, car owners may include in the original cost certain expenses which may not have been capitalized at the time of building.

* * *

In its 1955 decision, the Commission observed that freight car repairs constituted the largest single category of expense included in the car rental charge, amounting to some 40 percent of the total.[9] The special studies conducted by the Cost Section during 1960 were, in large part, directed to the problem of analyzing the cost of repairs to per diem cars and development of data which would aid in resolving some of the issues raised in respect to those costs. Particular attention was given to separa-

[9] The report in *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, indicates that repair costs were, in 1949, about 44 percent of the total costs employed in fixing the per diem rate.

tion of the expenses charged to account No. 314 which, as noted in the 1955 report, is the largest of the primary operating expense accounts embracing nearly 10 percent of total freight expense. The basic separation in connection with all repair expenses was between home and foreign per diem cars, with repairs to each separated between owner and user responsibility work.[32] Two sample studies were made, using forms 2 and 3, heretofore mentioned, and covering seven periods of 2 days each at intervals during 1960, to develop the proportion of repair wages and materials applied in each of these categories by repair facilities. Another test, using form 4, covering seven test periods of 1 day each at intervals during the year, was conducted to develop the proportion of wages of car inspectors assignable to various of their functions, including repairs made by them in trainyards. This study also sought to develop the cost of materials used in the making of such repairs and the consist of the trains inspected. These studies were carried out by all class I line-haul carriers, and analysis thereof indicates that about 79 percent of all wage and material costs were items of ownership responsibility and 7 percent items of user responsibility. The remaining 14 percent involved non-per diem cars which are not involved in these proceedings.[33] The total ownership repair costs for 1960, as computed by the Cost Section, amounted to $583,715,117, and comprised over 46 percent of the total expenses included in the per diem cost calculation.

[32] Definitions of these and other terms used in the studies are set forth in appendix A to this report. The distinction is necessary to insure inclusion in the per diem charge only those costs which should fairly be shared by all users. Repairs due to improper use of the car are not shared under this separation.

[33] In all studies non-per diem cars, including cabooses and mileage cars, were excluded, and the costs applicable thereto separated from the analysis.

Rail Form H—Summary T-1 docket No. 31358 cost calculation

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1953		
1	Freight-train car repairs	$679,141,264	123.865
2	Depreciation—cars	163,087,704	29.744
3	Depreciation—facilities	6,980,345	1.273
4	Property taxes—cars	64,212,598	11.712
5	Property taxes—facilities	3,433,615	.626
6	Payroll taxes	19,476,702	3.553
7	Return on investment—cars	201,930,867	36.829
8	Return on investment facilities	10,756,924	1.962
9	Hire of freight cars	9,431,201	1.720
10	Return on working capital	3,978,983	.726
	Total	1,162,430,203	212.010
	1954		
1	Freight-train car repairs	554,890,318	126.055
2	Depreciation—cars	169,767,994	38.567
3	Depreciation—facilities	7,043,238	1.600
4	Property taxes—cars	63,311,400	14.382
5	Property taxes—facilities	3,438,457	.781
6	Payroll taxes	18,146,192	4.122
7	Return on investment—cars	199,041,096	45.216
8	Return on investment—facilities	10,875,323	2.470
9	Hire of freight cars	11,242,442	2.554
10	Return on working capital	3,296,897	.749
	Total	1,041,053,357	236.499

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1955		
1	Freight-train car repairs	603,286,136	104.959
2	Depreciation—cars	171,434,763	29.826
3	Depreciation—facilities	7,363,580	1.281
4	Property taxes—cars	67,140,565	11.681
5	Property taxes—facilities	3,668,064	.638
6	Payroll taxes	19,501,025	3.393
7	Return on investment—cars	203,184,954	35.350
8	Return on investment—facilities	11,062,659	1.924
9	Hire of freight cars	14,893,645	2.591
10	Return on working capital	3,179,292	.553
	Total	1,104,714,683	192.198
	1956		
1	Freight-train car repairs	644,379,078	106.545
2	Depreciation—cars	176,897,170	29.249
3	Depreciation—facilities	7,505,969	1.241
4	Property taxes—cars	72,150,484	11.930
5	Property taxes—facilities	3,771,113	.624
6	Payroll taxes	23,131,938	3.825
7	Return on investment—cars	222,568,063	36.801
8	Return on investment—facilities	11,259,737	1.862
9	Hire of freight cars	18,254,405	3.017
10	Return on working capital	3,496,749	.579
	Total	1,183,414,706	195.673

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1957		
1	Freight-train car repairs	$651,821,299	110.972
2	Depreciation—cars	192,614,649	32.792
3	Depreciation—facilities	7,642,434	1.301
4	Property taxes—cars	78,420,978	13.351
5	Property taxes—facilities	3,816,368	.649
6	Payroll taxes	23,785,664	4.049
7	Return on investment—cars	251,923,349	42.890
8	Return on investment—facilities	11,352,234	1.933
9	Hire of freight cars	21,226,295	3.614
10	Return on working capital	3,003,640	.511
	Total	1,245,606,910	212.062
	1958		
1	Freight-train car repairs	557,905,703	123.417
2	Depreciation—cars	207,207,427	45.837
3	Depreciation—facilities	7,573,445	1.675
4	Property taxes—cars	79,409,419	17.565
5	Property taxes—facilities	3,754,155	.830
6	Payroll taxes	21,964,085	4.859
7	Return on investment—cars	256,308,192	56.699
8	Return on investment—facilities	11,222,647	2.483
9	Hire of freight cars	25,839,462	5.716
10	Return on working capital	3,004,609	.664
	Total	1,174,182,144	259.747

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1959		
1	Freight-train car repairs	603,784,873	118.498
2	Depreciation—cars	210,695,645	41.351
3	Depreciation—facilities	7,846,928	1.541
4	Property taxes—cars	81,335,604	15.963
5	Property taxes—facilities	3,847,571	.755
6	Payroll taxes	26,470,719	5.196
7	Return on investment—cars	262,253,764	51.469
8	Return on investment—facilities	11,364,753	2.230
9	Hire of freight cars	32,890,216	6.455
10	Return on working capital	2,997,354	.588
	Total	1,243,487,429	244.046
	1960		
1	Freight-train car repairs	583,715,117	116.113
2	Depreciation—cars	214,654,958	42.700
3	Depreciation—facilities	8,023,021	1.596
4	Property taxes—cars	82,153,074	16.342
5	Property taxes—facilities	3,824,341	.760
6	Payroll taxes	28,140,156	5.597
7	Return on investment—cars	272,469,259	54.200
8	Return on investment—facilities	11,489,897	2.286
9	Hire of freight cars	48,929,073	9.733
10	Return on working capital	2,896,316	.576
	Total	1,256,295,212	249.903

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1961		
1	Freight-train car repairs	$542,296,733	114.025
2	Depreciation—cars	219,854,362	46.227
3	Depreciation—facilities	7,972,133	1.676
4	Property taxes—cars	78,986,170	16.608
5	Property taxes—facilities	3,686,054	.775
6	Payroll taxes	26,091,704	5.486
7	Return on investment—cars	274,381,398	57.692
8	Return on investment—facilities	11,569,671	2.433
9	Hire of freight cars	58,820,065	12.367
10	Return on working capital	2,778,174	.584
	Total	1,226,436,464	257.873
	1962		
1	Freight-train car repairs	560,508,850	122.210
2	Depreciation—cars	227,907,354	49.692
3	Depreciation—facilities	7,963,807	1.736
4	Property taxes—cars	76,570,423	16.694
5	Property taxes—facilities	3,518,132	.767
6	Payroll taxes	27,554,545	6.008
7	Return on investment—cars	281,404,864	61.355
8	Return on investment—facilities	11,502,266	2.508
9	Hire of freight cars	68,949,490	15.033
10	Return on working capital	2,847,599	.621
	Total	1,268,727,330	276.624

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1963		
1	Freight-train car repairs	550,322,495	108.968
2	Depreciation—cars	235,414,671	46.614
3	Depreciation—facilities	8,071,570	1.598
4	Property taxes—cars	71,238,098	14.106
5	Property taxes—facilities	3,385,171	.670
6	Payroll taxes	27,145,511	5.375
7	Return on investment—cars	273,339,558	54.123
8	Return on investment—facilities	11,645,943	2.307
9	Hire of freight cars	76,831,485	15.213
10	Return on working capital	2,665,587	.528
	Total	1,260,060,089	249.502
	1964		
1	Freight-train car repairs	564,752,370	111.906
2	Depreciation—cars	249,246,959	49.389
3	Depreciation—facilities	8,088,396	1.603
4	Property taxes—cars	81,165,680	16.083
5	Property taxes—facilities	3,257,518	.646
6	Payroll taxes	28,162,325	5.580
7	Return on investment—cars	320,427,320	63.492
8	Return on investment—facilities	10,557,090	2.092
9	Hire of freight cars	90,957,044	18.023
10	Return on working capital	2,750,841	.545
	Total	1,359,365,543	269.359

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1965		
1	Freight-train car repairs	$562,290,338	110.712
2.	Depreciation—cars	266,697,638	52.511
3	Depreciation—facilities	8,143,383	1.604
4	Property taxes—cars	87,570,856	17.242
5	Property taxes—facilities	3,324,476	.655
6	Payroll taxes	29,179,129	5.745
7	Return on investment—cars	355,651,226	70.025
8	Return on investment—facilities	10,754,036	2.117
9	Hire of freight cars	119,334,451	23.496
10	Return on working capital	2,946,264	.580
	Total	1,445,891,797	284.687

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 56-1004-G

BOSTON AND MAINE RAILROAD ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

CIVIL ACTION No. 68-79-G

BOSTON AND MAINE CORPORATION,

Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

Woodbury,* *Senior Circuit Judge,* and Wyzanski and Garrity, *District Judges.*

OPINION OF THE COURT

March 18, 1969

WOODBURY, *Senior Circuit Judge.* This is another chapter in protracted litigation, primarily between long-haul freight originating railroads and short-haul freight ter-

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* Sitting by designation.

minating railroads, over the price one railroad should pay for the use on its line of another railroad's freight cars. In a previous chapter this court held, one judge dissenting, that the Interstate Commerce Commission had jurisdiction to enter an order at the behest of the long-haul roads that the rates for freight car use fixed by the Association of American Railroads (AAR) were just, reasonable and otherwise lawful and must be observed. *Boston & Maine Railroad* v. *United States,* 162 F. Supp. 289 (U. S. D. C., Mass. 1958). But the court remanded, directing the Commission to give further and more detailed consideration to the propriety of basing the rate, at least in part, on the distance a foreign car traveled on a using railroad's line instead of solely upon the time the car was on the user's line as had been the practice since about the turn of the century.[1] The Supreme Court, on representations of the Commission that it would follow the mandate of this court and undertake a study in depth of the problem under the power conferred upon it by §1(14)(a) of the Interstate Commerce Act,[2] dismissed cross appeals as prematurely presenting the question of the Commission's jurisdiction to issue a declaratory order in the premises. *Boston & Maine Railroad* v. *United States,* 358 U. S. 68 (1958).

Pursuant to its memorandum to the Supreme Court, the Commission reopened the case remanded to it and, consolidating with it two other cases pending before it under §1(14)(a), embarked upon a thorough, full-scale study of the problem. In January 1968 the Commission handed down a decision and order in the consolidated cases in which it concluded upon consideration of the voluminous record that the past calculations of the AAR were based

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[1] This history of *per diem* as it is known, is outlined in the previous opinion of this court and cases therein cited. No purpose would be served by recapitulation here.

[2] 40 Stat. 101 as amended, 41 Stat. 476, 49 U. S. C. §1(14)(a).

upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past *per diem* costs. In consequence it found that the complainants in the original case asking for a declaratory order that the AAR rates were just, reasonable and otherwise lawful, that is, the long-haul railroads, had failed to sustain their burden of proving that the rates in issue were indeed just, reasonable and non-discriminatory for use in determining *per diem* charges with respect to the defendants, the short-haul railroads. In the other cases before it the Commission in the exercise of its powers under §1(14)(a), *supra,* fixed separate rates for freight car use for each year from 1953 to 1965, inclusive, and provided that car use rates thereafter should be calculated in accordance with a rate table which itemized and valued each factor included in calculating the rate. The Commission's study convinced it that a line-haul mileage factor should be included in the rate for car use and provided that future rates should be separately calculated, assessed and paid not only with respect to the number of days cars are held on line but also with respect to the number of miles moved by users in line-haul service.[3] Consequently the Commission required railroads to keep records of line-haul use as well as records of days cars are on a user's line. The Commission did not base past *per diem* rates in any part upon mileage because it said no records existed upon which to determine the actual mileages of foreign *per diem* cars during past periods, or even to make any reliable estimate of the mileages of such cars.

The consolidated actions before us are to enjoin, set aside and annul the report and order of the Commission outlined above.

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[3] It did not include mileage in switching service because it said it would be impractical for railroads to keep records of mileage in such service.

> "In attempting to find a measure of the just apportionment of car-hire costs, the railroads and the Commission have had to face a condition of extraordinary complexity, and not a theory. The Fifth Amendment does not command the impossible. It does not demand that the power and duty of the Commission to make the apportionment be thwarted by requiring it to adopt a standard of unattainable exactness. The validity of what is of necessity a rule of thumb, best adapted to secure a just apportionment, can hardly depend upon a perfect precision in its application; its imperfections in this respect are themselves compensated by an advisedly sought simplicity and convenience of operations." Mr. Justice Stone, dissenting in *Chicago R. I. & P. Railway Co.* v. *United States,* 284 U. S. 80, 116 (1931).

Viewing the cases before us in the light of the above observations, in which Justices Holmes and Brandeis concurred, and which we think eminently appropriate, we find no error in the Commission's actions.

Several medium and long-haul railroads as intervenors make common cause with the United States in supporting the Commission's action. Short-haul railroads, primarily the Boston and Maine and the Trustees of the New York, New Haven and Hartford, for convenience B&M and NH hereinafter, challenge the Commission's action on several grounds.

The challengers strenuously assert that the Commission by its action requires them to pay certain car repair items twice.

Under the rules of the AAR car owners are responsible for repairs attributable to ordinary wear and tear, and

car users are responsible for car repairs made necessary by damage "due to unfair usage or improper protection by the using line." Obviously certain car repairs have to be made to foreign cars when on a user's line to make the cars safe and serviceable. Such repairs are made by the using line which charges the repairs to the car owner at rates fixed by the AAR for specific repairs. The complaining railroads contend that the rates fixed by the AAR are below costs which results in a car repair deficiency in the amount, they say, of about 98 million dollars per year. They assert that the Commission has included this figure in fixing the *per diem* whereby the railroads pay this deficiency twice, once when they repair the foreign car and again in the *per diem* rate for the use of the car.

The Commission did not overlook this assertion. It said: "Upon all evidence, it is found that the car repair deficiency to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable." Moreover the Commission pointed out that the B&M and the NH railroads actually benefited from the low repair costs because, as freight terminating roads with a surplus of foreign cars available for their own loadings, they could, as they in fact did, exercise a good deal of selectivity in the choice of cars to repair and load, whereas the long-haul freight originating railroads with their demand for cars could not be as selective, so that as a result the B&M and NH profited substantially every year by having their cars repaired by other roads more cheaply than they could repair their cars themselves.

Per diem rates and car repair deficiency to the extent that it actually exists may be interrelated. But there is nothing in the statute or in any court decision we know of requiring the Commission to treat the two as inextricably

linked. We think it well within the bounds of the Commission's discretion to treat the items separately, at least until the short-haul lines make some attempt to change AAR repair rates if they think change to their financial advantage.[4]

The Commission's decision that line-haul mileage is an essential element of just and reasonable compensation for the future does not mean, as the B&M and NH contend, that the Commission's determination that rates for the past should be based upon time on line alone is necessarily erroneous. A finding of unlawfulness of future rates does not by itself compel a similar conclusion as to past rates.

It is true that as to past years the long-haul freight originating and largely "car owner" roads had the burden of proving that existing AAR rates were just and reasonable. And it is true that in this they failed, for the Commission has now held that those rates were not just and reasonable. But it does not follow that the predominently freight car owner group is somehow obliged to produce line-haul mileage figures for the past from non-existent records. The law does not demand the impossible. It was within the Commission's discretionary power to fix past rates on a straight time basis, as they had been fixed for decades by the railroads themselves, rather than to add a line-haul use factor which could not be based upon data but could rest only upon surmise.

The B&M and the NH point out that the Commission did not find that the amounts they had chosen to pay for car use in the past were outside the zone of reasonableness and contend that in the absence of such finding they cannot be compelled to pay higher rates even though such higher rates are also within the zone of reasonableness. We disagree.

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[4] The B&M's one attempt to change an AAR billing rate, that for replacing roller bearings, was successful.

In fixing specific rates for past years the Commission was speaking directly to the United States District Court for the Southern District of New York and the Supreme Court of the State of New York for New York County. In each court claims by other railroads against B&M and NH for money due for use of freight cars had been partially settled by entry of judgment on the issue of liability against B&M or NH, but entry of final judgment had been deferred until the Commission determined pursuant to a reference the reasonable rate of compensation for the use of freight cars.[5] In answering the references the Commission properly was not concerned with any possibly proper or reasonable zone or range of rates but only with a specific rate upon which awards for past use should be based. Furthermore by finding that specific rates would be "the just, fair, reasonable and non-discriminatory rates", the Commission indicated that any other rates would not meet that standard.

There was no error in the Commission's use of Account No. 53, Index of Freight Car Costs, as a guide for calculating loss of purchasing power by reason of inflation. Indeed it seems to us more appropriate to use freight car construction cost alone as the guide to rising car costs than general costs reflected in the Wholesale Price Index of the Bureau of Labor Statistics, which reflect price increases in general, as the B&M and NH urge.

We also reject the contention of the B&M and NH that the Commission erred in approving a system of car hire

[5] The cases pending in the U. S. District Court are reported in *Baltimore and Ohio Railroad Co.* v. *New York, New Haven and Hartford Railroad Co.*, 196 F. Supp. 724 (S. D. N. Y., 1961). The cases pending in the Supreme Court of New York for New York County are *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and *New York, New Haven and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63.

charges for the future based upon the assumption that repair cost and car utilization are the same for all cars regardless of age and value. Their argument is that older cars require more repair than newer ones and that the more modern cars are used in preference to older ones and therefore have a different utilization ratio which ought to be considered in fixing *per diem* rates.[6] We see no reversible error in the Commission's disposition of this contention as follows:

> "It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission."

It is not the function of this court to reevaluate the record or to substitute its judgment for that of the Commission. The adequacy of the evidence to support the contention of the B&M and NH is for the Commission. Anyway the door is not closed to the reception of further data.

The B&M and NH also complain of the Commission's use of average costs of all freight car owners instead of

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[6] For explanation of car utilization ratio and "car day divisor" see the former opinion of this court. 162 F. Supp. 289, 296 (1958).

the specific costs of each separate owner and they say that if it was proper for the Commission to use average costs then the Commission should also have used averages in constructing a line-haul mileage charge for past years. We see no merit in either assertion of error.

Certainly separate cost figures for each freight car owning railroad would vastly complicate record keeping and the computation of car hire rates. Nor does it appear that averaging car owner costs would work any gross unfairness. Costs are not so dissimilar that use of an average figure would work any great injustice. Averaging foreign line-haul car mileage, however, is quite another matter. Studies conducted by the Commission of the year 1960 show that the average distances foreign *per diem* cars moved that year varied from an average daily mileage of 4.8 miles on the Long Island Rail Road to a daily average of 120.9 miles on the Union Pacific. On the basis of these figures for 1960 it seems obvious that an average figure for line-haul mileage would not be fair or just. It is for the Commission to decide when to resort to averages and when not to. We see no abuse of discretion in the Commission's use of average freight car costs but not average line-haul mileage on foreign lines.

Other assertions of the Commission's error are either disposed of by what we have already said, or were abandoned on oral argument, or are too insubstantial to warrant discussion or even enumeration.

In conclusion it will suffice to say that in our view the Commission has dealt thoroughly with a highly complex problem and after full and painstaking study has come up with a rational and fair solution as simple and convenient as the intricacy of the problem permits.

Judgment will be entered dismissing the complaints.

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UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 56-1004-G

Boston and Maine Railroad, et al

v.

United States of America and Interstate Commerce Commission

AND

Civil Action No. 68-79-G

Boston and Maine Corporation

v.

United States of America and Interstate Commerce Commission

JUDGMENT

Woodbury, Sr. J., Wyzanski, Ch.J., and Garrity, D.J.

In accordance with the Opinion of the Court dated March 18, 1969, it is hereby Ordered

Judgment for the Defendants; Complaints dismissed.

Dated at Boston, Massachusetts, this 20th day of March, 1969.

Peter Woodbury
Charles E. Wyzanski, Jr.
W. Arthur Garrity, Jr.

By the Court,
Kathleen M. Dolan
Deputy Clerk

APPENDIX G

INTERSTATE COMMERCE COMMISSION

Service Date
September 14, 1962

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. ET AL.

No. 33145

RAILROAD FREIGHT CAR PER DIEM CHARGES

Decided September 5, 1962

On reconsideration, reassignment of the proceedings herein to a hearing examiner for hearing and the recommendation of an appropriate order thereon, accompanied by the reasons therefor, in lieu of a hearing examiner found to have voluntarily withdrawn from the previous assignment thereof to him for such purposes, affirmed.

Appearance as shown in prior report in No. 31358, and in addition:

Reginald Ames, Kenneth H. Ekin, A. Paul Funkhouser, Joseph L. Lenihan, Charles M. Little, Edward M. Reidy, E. L. Ryan, Jr., T. J. Slattery, and *Claude R. Wilson, Jr.,* for complainants.

Richard E. Costello and *Rowland Posey* for interveners in support of complainants.

William T. Griffin, Neal Holland, and *Peter Benton Spruance* for defendants.

Appearances in No. 33145:

Reginald Ames, J. T. Clark, L. W. Hobbs, Martin J. Keating, Gordon E. Neuenschwander, W. H. Parsons, Leo H. Pou, John F. Reilly, E. L. Ryan, Jr., T. J. Slattery, Richard H. Strodel, and *Ross L. Thorfinnson* for respondents.

REPORT OF THE COMMISSION ON RECONSIDERATION OF CERTAIN ORDERS

Involved in No. 31358 is the matter of determining the lawful rate of per diem or compensation to be paid by certain nonowning railroads for the use on their lines of freight cars owned by other railroads during the period from August 1953, to the present. The Commission made a declaratory determination thereof in that proceeding, 297 I. C. C. 291, which became the subject of a suit by the petitioners in a Federal court in Massachusetts entitled *Boston & Maine Railroad* v. *United States,* 162 F. Supp. 289 (D. Mass.), appeal dismissed *per curiam,* 358 U. S. 68 (1958), challenging certain aspects of that determination. Upon remand by the courts to the Commission, the proceeding was reopened for further hearing by order entered March 24, 1959.

By order of July 24, 1959, in No. 33145, the Commission, among other things, initiated an investigation under section 1(14)(a) of the Interstate Commerce Act for the purpose of esablishing reasonable rates, regulations, and practices for the determination of the compensation to be paid for the use by one carrier of freight cars owned by another carrier, and ordered that both of these proceedings be heard on a consolidated record at a time and place to be fixed. All rail carriers subject to part I of the Act were made respondents. Both proceedings were assigned to Hearing Examiner Rene J. Mittelbronn for hearing and the recommendation of appropriate orders accompanied by the reasons therefore. On June 1 and September 29, 1959, he presided at and made a report upon matters considered at a pre-

hearing conference held for the purpose of determining special procedure to be pursued in the disposition of the proceedings.

Thereafter, and before any evidence was adduced, Mr. Mittelbronn at his own request was relieved of his assignment to the proceedings, as set forth in the order of Chairman Winchell dated February 15, 1960. Hearing Examiner Walter L. Baumgartner subsequently was assigned to the proceedings.

By petitions, dated February 6, 1960 and April 15, 1960, the defendants in No. 31358,[1] who are also among the numerous respondents in No. 33145, requested reconsideration and vacation or modification of the orders relating to the change in examiner assignments,[2] and, ancillary thereto,

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[1] Hereinafter, where appropriate, the defendants will be referred to either as petitioners or defendants, depending upon the context.

[2] Three orders are here involved; one dated January 7, 1960 and two others, each dated February 15, 1960. The order of January 7, 1960 was confined to the grant in part of the petitions of defendants-respondents dated December 15 and 24, 1959 with respect to the inclusion of additional questionnaire forms within the scope of the orders of November 25, 1959, and the service of the orders upon certain respondents in No. 33145 not theretofore served. Reconsideration and modification of that order is now sought by the defendants in their petition dated February 6, 1960, under consideration herein, so as to effect reinstatement of the assignment of both proceedings to Examiner Mittelbronn for hearing and the recommendation of appropriate orders, etc. Such relief had been sought in the petitions of December 15, 24, 1959. The two orders of February 15, 1960 disposed of those requests: one, issued by Division 3 of the Commission (subsequently corrected), denying the petitions insofar as they requested the reassignment to Examiner Mittelbronn of the proceedings for hearing and the recommendation of appropriate orders, etc. The other, issued by Commission Chairman Winchell, recited the voluntary withdrawal of that Examiner from, and rescinded, his previous assignment, and referred the proceedings to Examiner Baumgartner for hearing and the recommendation of appropriate orders, etc. Reconsideration and modification of these two orders are now sought by defendants in the petitions above mentioned.

hearing and oral argument, the issuance of subpoenas or orders of equivalent effect to certain Commission personnel to aid in the adduction of facts pertinent to the relief sought, the provision of certified copies of a list of hearing examiners available for assignment to the proceedings as of September 1959, and other documents pertaining to the assignment of hearing examiners named on the list between September 1959, and February 1960. The complainants and their supporting interveners in No. 31358 requested only that the Commission take such corrective procedural steps as may be determined by the Commission's General Counsel to be necessary to insure that the proceedings were free of any procedural irregularity claimed in the petitions. They offered also to stipulate the acceptance of the assignment of Examiner Baumgartner without challenge. The offer was rejected by petitioners for the assigned reason that "basic jurisdictional defects" may not be waived.

The petitioners maintain that Examiner Mittelbronn's withdrawal from the assignment was ineffective because under section 7 of the Administrative Procedure Act (hereinafter referred to as the A. P. Act) 5 U. S. C. A. 1006, the examiner could not withdraw from his duties and responsibilities as such, except by filing an affidavit of personal bias or disqualification, which was not done, and that his personal wishes are not a controlling factor. Section 7(a) of the A. P. Act provides in pertinent part as follows:

> * * * The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

This section provides that a hearing examiner may withdraw from a proceeding if he "deems himself disqualified." It also provides that if one of the parties files an affidavit of bias or disqualification of such officer, the agency shall "determine the matter as a part of the record and decision in the case."

There is nothing in the record to indicate that Mr. Mittelbronn deemed himself disqualified. Likewise, no question of bias or disqualification of Mr. Mittelbronn has been raised by affidavit or otherwise, such as is contemplated in the last portion of this section.

Accordingly, section 7(a) is not applicable here. This section, however, does not prevent an agency from relieving a hearing examiner from an assignment upon his request, for such reasons as the agency considers adequate. The action here was simply one of internal procedure and management, consistent with this Commission's inherent powers and duties. Thus, in relieving Mr. Mittelbronn, and assigning Mr. Baumgartner to these proceedings, there was no violation of section 7(a) as alleged.

No hearing had been held and no evidence had been received prior to the relief of Mr. Mittelbronn from his assignment. He had only participated in two prehearing conferences held on June 1, 1959 and September 29, 1959, at which the parties to the proceedings had agreed upon procedure for the future conduct of hearings as set forth in the statement issued by Mr. Mittelbronn on October 5, 1959, entitled "Reporting Action at Prehearing Conferences and Directing Future Procedure", which was made a part of the record. Mr. Mittlebronn was permitted at this stage of the proceedings to withdraw on his own volition, as heretofore stated. Hearing in the proceedings will be conducted by Hearing Examiner Baumgartner, to whom they have been assigned.

In the administration of proceedings involving hearings, it often becomes necessary to relieve an examiner of an assignment made in the preparation of an itinerary because the hearing is thereafter postponed, or because of his illness or the overrunning of a hearing into the time fixed for the next hearing on the examiner's schedule, or because of other unforeseen exigencies beyond the control of either the examiner or the Commission. In our opinion, an examiner may also be relieved of an assignment by mutual agreement between him and the Commission. These views are based upon the necessities attendant upon the proper, efficient, and economical administration of the Commission's functions and the relationship of the examiner as an employee of the Commission. It is hardly necessary to point out, however, that any manipulation of assignments designed to interfere with, or having the effect of interfering with or influencing, the independence of the examiner in the performance of his duties or the exercise of his discretion as a hearing officer, would run counter to the spirit and purpose of the A. P. Act.

In any event, since Mr. Mittlebronn had not presided at the taking of any oral evidence (See Sec. 8(a) of the A. P. Act, 5 USCA 1007(a)), the matter is not open to question by any party. The extent of his participation was to hold two pre-hearing conferences. These dealt solely with procedural matters. He had not presided "at the reception of evidence" in these proceedings, and thus was not required to make the "recommended decision or initial decision" contemplated in section 5(c) of the A. P. Act (5 U. S. C. 1004(c)). The petitioners' claim of violation of their rights to procedural due process of law under the Fifth Amendment to the Constitution fails to specify any matters of fact to establish such a violation or to point to any palpable injury or prejudice caused thereby.

In oblique fashion, petitioners suggest irregularity in the intimated failure to assign these proceedings to a

successor examiner in rotation, as required by section 11 of the A. P. Act (5 USCA 1010). That section provides for the manner of appointment of competent hearing examiners by the agency, "who shall be assigned to cases in rotation so far as practicable." The Commission has long since concluded that the assignment of cases to hearing examiners in strict rotation is impracticable; indeed, impossible, if economy, and efficiency in administration are to be achieved. In general itineraries of cases are assigned to examiners by rotation. For reasons of economy, instead of assigning cases ripe for hearing in a compact geographical area in rotation to as many examiners as there are cases, all are usually assigned to one examiner on one itinerary. Moreover, the assignment of cases requiring special or unusual skill or knowledge of particular subject matters to examiners having such skill or knowledge,[3] and the unavailability of examiners next in rotation because of their absence on account of illnes or other disability, or on annual leave, or because of their respective work loads on hand, all conspire against efforts at strict rotation. Assignment out of rotation in accordance with itinerary requirements for reasons of economy was sanctioned in *Tractor Training Service* v. *F. T. C.*, 227 F. 2d 420, 423 (9th Cir. 1955). In a footnote, the court cited this Commission as one of four agencies in addition to the Federal Trade Commission which deviate from the rotation requirement.

The petitioners also contend that Examiner Mittelbronn's withdrawal was ineffective because it was based upon omis-

[3] While the requirements for rotation are designed to prevent an agency from disfavoring an examiner by rendering him inactive, "examiners may be permitted to specialize and be assigned mainly to cases for which they have so qualified." Senate Doc. No. 248, 79th Cong., 2nd Sess., pp. 215, 280. Also see *Ramspeck* v. *Trial Examiners Conference*, 345 U. S. 128 (1953).

sions [4] from the orders accompanying the questionnaires which were subsequently corrected by order of Division 2 on January 7, 1960, and because the request for withdrawal was made not to the Commission, but to the Director of the Bureau of Rates and Practices. With respect to the former, such a circumstance does not negative the action taken upon the request for withdrawal as heretofore stated, and concerning the latter, the reassignment order of the Chairman, on its face, shows that the matter reached the attention of the Commission, and the question of an intermediary is of no consequence. In view of the previous discussion, no further elaboration on these contentions is deemed necessary.

For the foregoing reasons, we find and conclude that the grant of relief sought in the petitions for reconsideration and modification of the orders here in issue is not warranted in law or in fact. The request for oral argument is denied because petitioners' contentions are adequately presented in their petitions, and such argument would not contribute to a better understanding of their position. The request for hearing and subpoenas or equivalent orders is denied because the basic allegations of fact appearing in the petitions, if proved, are insufficient to establish the claim for the relief sought.

An order will be entered denying the petitions in all respects save as to ancillary requests therein previously granted.

COMMISSIONER WEBB did not participate.

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[4] The alleged omissions consisted of (1) the failure of the Commission to order or provide for the service upon the parties to the proceedings, other than class I carriers, of an order issued November 25, 1959, by Division 2, *supra*, requiring class I carriers to submit the information called for in questionnaire forms attached to the order, and (2) the failure to include within the scope, or to attach to that or another order of the same date, directed to carriers of classes I and II certain questionnaire forms designed to elicit specified information from such carriers. The issuance of such forms had been tentatively agreed upon by representatives of the parties and the Commission at a prehearing conference held before Examiner Mittelbronn on September 29, 1959.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of September, A. D. 1962.

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. ET AL.

No. 33145

RAILROAD FREIGHT CAR PER DIEM CHARGES

It appearing That upon consideration of the records in the above-entitled proceedings, the petitions by the defendants-respondents, dated February 6, 1960 and April 15, 1960, for reconsideration and modification of the order of the Commission entered on January 7, 1960, and two orders therein each entered on February 15, 1960, and the complainants-respondents' reply to said petitions and, being fully advised in the premises, the Commission, on the date hereof, has made and filed its report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the said petitions and ancillary requests therein made, except such requests as have heretofore been granted, be, and they are hereby, denied.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX H

Statutes Involved

Administrative Procedure Act:

DEFINITIONS

5 U. S. C. §551(4)-(7)

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

Rule Making

5 U. S. C. §553(d)

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

Adjudications

5 U. S. C. §554(d)

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency

review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

HEARINGS, PRESIDING EMPLOYEES . . . EVIDENCE . . .

5 U. S. C. §556(b), (d)

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating em-

ployee, the agency shall determine the matter as a part of the record and decision in the case.

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

APPOINTMENT OF HEARING EXAMINERS

5 U. S. C. §3105

Each agency shall appoint as many hearing examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practical, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners.

Interstate Commerce Act:

SEC. 1, pars. 4, 10, 11, 14(a). [*49 U. S. C. §1(4), (10)-(11), (14)(a).*]

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon

reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

* * *

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad

subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

SEC. 13(1) [*49 U. S. C. §13(1).*]

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omited to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Com-

mission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2) [*49 U. S. C. §15(2).*]

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 16(1) [*49 U. S. C. §16(1).*]

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.